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In the Supreme Court of the United States

October Term, 1980
No.

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,
Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that institutionalized mentally retarded persons have substantive due process rights (1) to receive treatment which is both acceptable in light of present medical or other scientific knowledge and which is the least intrusive treatment available under the circumstances; (2) to be free of restraints, whether for treatment or protection, absent a showing of compelling necessity and (3) to be protected from harm, however caused, absent a showing of substantial necessity.

2. Whether an appellate court which admittedly creates new constitutional rights in considering claims for damages under 42 U.S.C. §1983 must, as a matter of law, direct dismissal of that claim on the grounds of qualified immunity.

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The opinion of the Third Circuit has not yet been reported, and is reproduced in the appendix (1a). The opinion of the District Court on the defendants' motion to dismiss was not reported, *Romeo v. Youngberg*, No. 76-3429 (E.D. Pa., filed June 6, 1977), and is also reproduced in the appendix (79a-85a).

STATEMENT OF JURISDICTION

The Court of Appeals filed its decision on November 24, 1980. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

United States Statute

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Pennsylvania Statute

Pa. Stat. Ann. tit. 50 §4406

> (a) Whenever a person is believed to be mentally disabled, and in need of care or treatment by reason of such mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such per-

son cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.

. . .

STATEMENT OF THE CASE

Plaintiff is a profoundly mentally retarded person who was involuntarily committed[1] to Pennhurst State School and Hospital[2] in July of 1974, at age 26, at the request of his mother, who was no longer able to care for him at home. While at Pennhurst, plaintiff has been injured on a number of occasions. These injuries were both self-inflicted and the result of attacks by other residents, mostly in retaliation against his aggressive behavior.

This civil rights action was brought in November of 1976 by plaintiff's mother on his behalf. By his original complaint, plaintiff sought damages under 42 U.S.C. §1983 from three supervisory officials at Pennhurst for the injuries he had incurred,[3] relying on the Eighth and Fourteenth Amendments. He also sought an injunction requiring that he be protected from such harm in the future.

Subsequently, plaintiff amended his complaint to include allegations that defendants had kept him shackled or otherwise physically restrained to a bed or chair in the

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[1] Plaintiff was committed pursuant to the involuntary commitment provision of the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50 §4406 (Purdon). The legality of that commitment is not at issue in this case.

[2] Pennhurst is a state operated institution for the mentally retarded. It is the focus of *Pennhurst State School and Hospital v. Halderman*, No. 80-1404, presently pending before this Court.

[3] Plaintiff alleged that defendants knew of his injuries and, as supervisors, failed to create procedures which would have avoided such injuries from occurring in the future.

hospital at Pennhurst for long periods of time each day.[4] The amended complaint also sought damages for defendants' alleged failure to provide plaintiff appropriate treatment in the least restrictive environment. Plaintiff also requested injunctions against the alleged constitutional violations, but withdrew those requests prior to trial.[5]

Trial was held in April of 1978. At trial, the District Court refused to permit plaintiff to present the testimony of two experts who, according to plaintiff, would have testified that the plaintiff's treatment programs at Pennhurst were inappropriate and that plaintiff's injuries were the result of the failure to provide more appropriate programming[6] (97a-101a, 102a-104a) Plaintiff also represented that one of those experts would testify that, while restraints are a proper mode of treatment in some cases, they were used improperly in plaintiff's case (101a). The District Court excluded the testimony, ruling that, while it might be relevant to an issue of malpractice, it had no relevance to the constitutional claims[7] (101a, 105a, 109a).

In addition, the District Court rejected a jury instruction proposed by plaintiff which maintained that

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[4] At trial, defendants contended that plaintiff was placed in the hospital at the request of his attorney and that in that setting restraints were necessary to protect other patients.

[5] Plaintiff is a member of the class in *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 100 S.Ct. 2984 (1980), and, therefore, was required to seek injunctive relief in the context of that case.

[6] There is no dispute that plaintiff has received treatment while at Pennhurst. Plaintiff does dispute the appropriateness of that treatment.

[7] The evidence showed that plaintiff had received a variety of treatment programs intended to curb his aggressive behavior and reinforce his self-help skills (N.T. 5-44, 5-45, 5-48, 5-55).

plaintiff had a right to treatment in the least restrictive environment. Instead, determining that plaintiff's claims were governed solely by the Eighth Amendment,[8] the court instructed the jury that in order to find for plaintiff, it must find that defendants acted with "deliberate indifference to the serious medical needs of the resident."[9]

At the conclusion of eight days of trial, the jury returned a verdict in favor of all defendants. Plaintiff appealed that verdict to the Court of Appeals.

On appeal, the Court of Appeals[10] found that the District Court had erred in excluding the expert testimony offered by plaintiff and that the court had also erred in issuing an Eighth Amendment instruction to the jury.[11] Accordingly, the Court of Appeals vacated the judgment

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[8] Neither plaintiff's complaint nor his proposed points for charge describe the specific source of the constitutional rights asserted by him. Rather, repeated reference is made to rights under the Eighth and Fourteenth Amendments. The District Court apparently construed plaintiff's claims as arising solely under the Eighth Amendment as made applicable to the states under the Fourteenth Amendment. The Court of Appeals disagreed. While recognizing plaintiff's failure to assert clearly the Fourteenth Amendment as a separate legal basis for relief, the Court of Appeals construed the complaint as asserting substantive due process claims (6a, n. 2).

[9] In so doing, the court relied on *Estelle v. Gamble*, 429 U.S. 97 (1976).

[10] The case was first heard in January of 1979 by the same panel that heard *Halderman v. Pennhurst State School and Hospital, supra.* As in *Halderman*, that panel issued no opinion; instead, after issuance of the *Halderman* opinion by the Court en banc, this case was scheduled for reargument before the Court en banc. Reargument was heard April 28, 1980.

[11] Plaintiff raised several other grounds for reversal. The Court of Appeals did not base its decision on those grounds.

of the District Court and remanded the case for a new trial.

However, the Third Circuit was sharply divided, five-four,[12] on the issue of the standards to be applied in evaluating plaintiff's claims. The majority discerned three separate constitutional rights, all based in substantive due process: (1) a right to be free from undue bodily restraint; (2) a right to personal security and protection; and (3) a right to the "least intrusive" adequate treatment.[13]

Specifically, the majority held that the use of physical restraints may be justified only by defendants' showing of "compelling necessity", i.e., that the restraints are essential to protect or treat the resident (18a-20a).[14] In addition, in order to be justified, the restraints used must have been "the least restrictive method of dealing with the patient in light of his problems and the surrounding environment" (18a-19a). Finally, the majority held that, except in emergency situations, neither inadequate resources nor administrative concerns justify the use of restraints (18a).

The majority went on to hold that a failure to protect a resident from attacks by other residents could be justified only by "substantial necessity" (25a). According to the majority, the "substantial necessity" standard

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[12] There were three concurring opinions (48a-78a).

[13] The lower court purported to limit its holding to the involuntarily confined (3a, 47a). This distinction is apparently irrelevant in light of that court's holding in *Halderman* that all residents of Pennhurst were there involuntarily, 612 F.2d at 94.

[14] Thus, according to the majority, the use of restraints to protect others is not permissible under any circumstances.

would require the jury to distinguish between isolated mishaps and patterns of attacks, injuries or violent behavior (25a).

Finally, in evaluating plaintiff's right to treatment claim, the majority established three separate standards. While conceding that the evidence in this case did not suggest a failure to treat plaintiff, the majority nonetheless addressed that situation,[15] holding that a failure to provide treatment can be justified only by a compelling explanation (35a, 47a). On the other hand, if some treatment is provided, the constitution generally requires that that treatment be both "acceptable in light of present medical or other scientific knowledge" (36a-38a) and the "least intrusive treatment available under the circumstances" (31a-32a).[16]

The four concurring judges, per Chief Judge Seitz, disagreed with the majority's multi-pronged approach. Instead, recognizing that each of plaintiff's claims involved mixed questions of law and medical judgment, Chief Judge Seitz found that plaintiff's claim should be evaluated un-

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[15] As each of the concurring judges noted, the majority considered several issues not raised in this case (Seitz, C.J., 48a; Aldisert, J., 74a; Garth, J., 76a-77a). Moreover, these issues are also incorporated in proposed jury instructions set forth in an appendix to the majority opinion (47a).

[16] While, in its proposed jury instructions, the court purported to limit application of the "least intrusive treatment" requirement to those situations imposing "significant deprivations of liberty" (47a), this distinction is meaningless. Obviously, where no "significant deprivation of liberty" is occurring, a nonrestrictive treatment is being used, satisfying the "least intrusive" standard. Thus, implicitly or explicitly, the "least intrusive" standard must be met in every treatment decision.

der a single standard: whether defendants' conduct "was such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment" (59a).

It is from this decision that the defendants, hereinafter referred to as petitioners, seek a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Questions of Great Public Importance

"This case presents legal issues that take the next step beyond *Halderman* [*v. Pennhurst State School and Hospital*, 612 F.2d 84 (3d Cir. 1979) (en banc), *cert. granted*, 100 S.Ct. 2984 (1980),]"[17] a case heard by this Court earlier this term. In *Halderman*, the Third Circuit found a right to treatment in the least restrictive environment under a federal statute[18] and, therefore, found it unnecessary to reach the constitutional right to treatment issues.[19] In this case, however, the Third Circuit was required to reach those constitutional issues[20] and to do so in the context of the specific treatment provided an individual resident of Pennhurst.

This case also involves an issue akin to that presented in *Parratt v. Taylor*, No. 79-1734 (U.S. S.Ct.), *cert. granted*, 101 S.Ct. 315 (1980), a case this Court will consider later this term. In *Parratt*, the Eighth Circuit summarily affirmed a district court ruling that simple negli-

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[17] (49a) (Seitz, C.J., concurring).

[18] Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6001-6081.

[19] If, as requested by petitioners therein, this Court reverses the lower court's statutory finding in *Halderman*, either this Court or the Court of Appeals would then be required to reach essentially the same constitutional issues raised in this case.

[20] Plaintiffs asserted only constitutional claims.

gence can form the foundation for an action under 42 U.S.C. §1983. 620 F.2d 307 (8th Cir. 1980). In this case, the Third Circuit has adopted that proposition and extended it to malpractice.

In so doing, the Third Circuit broke new ground, going far beyond the holdings of this Court.[21] Notwithstanding this Court's repeated admonition against the creation of constitutional torts,[22] the Third Circuit has done exactly that—in triplicate. First, the court found that institutionalized mentally retarded persons have a substantive due process right to treatment which is "acceptable in light of present medical or other scientific knowledge" (37a-38a) and which must also be the "least intrusive available under the circumstances" (31a-32a). But see *O'Connor v. Donaldson*, 422 U.S. 563 (1974) (establishing a right to liberty where no treatment provided to a non-dangerous patient who is able to survive safely in freedom). The court also held that such persons have separate and distinct due process rights to be free of restraints except in cases of "compelling necessity" and to be protected from harm unless "substantial reasons" exist for the failure to do so (18a-20a, 25a). But see *Bell v. Wolfish*, 441 U.S. 520 (1979) (rejecting the use of "compelling necessity" standard in evaluating conditions of pretrial detention). Thus, in an area in which this Court has

[21] Indeed, in *State v. Sanchez*, 396 U.S. 276 (1970), this court dismissed for want of a substantial federal question an appeal asserting a constitutional right to treatment in the least restrictive environment. The Third Circuit considered *Sanchez*, but rejected it as binding precedent (37a, n. 56).

[22] See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Screws v. United States*, 325 U.S. 91 (1945).

cautioned against judicial interference and has itself acted with extreme restraint,[23] the Third Circuit has created constitutional rights far beyond those considered, let alone recognized, by any other court.[24]

One obvious result of this holding will, of course, be increased federal litigation. In 1976, there were over 150,000 mentally retarded persons in the United States residing in state institutions.[25] Under the Third Circuit's holding, the federal courts will become repositories for most, if not all, personal injury claims arising in those institutions as its standards for proving constitutional violations are generally less stringent than those applicable to state law claims arising out of identical activities,[26] such

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[23] See, e.g., *Parham v. J. R.*, 442 U.S. 584 (1979); *O'Connor v. Donaldson, supra.*

[24] Many courts have considered the constitutional rights of the mentally retarded. See, e.g., *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *J. L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), *rev'd. on other grounds*, 442 U.S. 584 (1979). Cf. *O'Connor v. Donaldson, supra* (mentally ill). No other court has even suggested the standards of "compelling" or "substantial necessity" in relation to the treatment of the mentally retarded. In addition, even the Fifth Circuit, initially the leading proponent of a constitutional right to treatment, has since expressed its strong reservations concerning the very existence of such a right. Compare *Morales v. Turman*, 562 F.2d 993 (5th Cir.), *rev'd and rem'd on other grounds*, 430 U.S. 322 (1977) (per curiam) with *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *rev'd*, 422 U.S. 563 (1975).

[25] *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295, 1300, n. 7 (E.D. Pa. 1978).

[26] An additional incentive to bring these actions in federal court is the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988.

as malpractice.[27] In addition, the Third Circuit, relying exclusively on its decision in this case, has recently created equivalent rights for the mentally ill. *Scott v. Plante*, Nos. 80-1314/1315, 80-1596 (3d Cir., filed Feb. 5, 1981) (116a). Thus, judicial review, on constitutional grounds, of individual treatment regimes and modalities will become commonplace, both as to damages and injunctive relief.

As importantly, while the Third Circuit clearly imposed new and extensive obligations on state employees, the nature of those obligations is far from clear. Indeed, as is discussed below, those duties appear to conflict with each other in several respects. Ironically, because of this vagueness, the decision will likely have serious adverse effects on the care of the retarded. The reasons were aptly described by Judge Aldisert, concurring in the decision below:

> It has been almost twenty years since I faced a client across a law office desk. But were I to be placed in that position today, my advice would probably go like this: if you are contemplating a position as an attendant in a mental hospital, seek another job; there is simply too much unpredictability in the law governing your conduct. If you are a physician, make certain that the state's malpractice insurance policy includes a clause protecting you from the new 'constitutional torts' manufactured today by the Third Circuit Court of Appeals. If you are an insurance

[27] See *Incollingo v. Ewing*, 444 Pa. 263, 282 A.2d 206 (1971) (unjustified departure from established standards of medical practice is malpractice). Pennsylvania law, of course, makes no reference to the concept of "less intrusive treatment".

> carrier, set your premiums high, anticipating fully and completely the open-ended notions of 'substantial' and 'compelling' necessity and 'least intrusive treatment.' If you are a governor or state legislator, cut back and retrench institutional programs for the mentally retarded, because the potential for lawsuits has now increased geometrically, with corresponding demands on the tax base to support the costs. If you are a parent with a retarded child, I simply feel sorry for you. The sincere effort to provide financial relief for personal injuries suffered by retarded persons has been accomplished at an enormous social cost. In striking the balance between how seriously the complainants are being hurt and how much it will cost to afford them more relief than is presently available under state tort law, the balance has been struck so vaguely that state institutional programs, already diminishing, will be curtailed further. Given the recent political currents, there simply are not, and will not be, sufficient tax dollars, state or federal, to give the defendants adequate financial protection to meet the illusory standards promulgated today.

(75a-76a) (Aldisert, J., concurring).

This Court should intervene at this point to avoid the confusion which will certainly result from the broad holding of the court below. Accordingly, and because this case involves issues of great public importance, this Court should grant review of this case.

II. The Decision of the Court of Appeals Is Clearly Erroneous

A. The Third Circuit erred in evaluating the rights of the mentally retarded.

Plaintiff asserted a "right to treatment under the least restrictive conditions consistent with the purpose of the commitment" (95a). The Court of Appeals took this claim and converted it into a complex multi-level series of constitutional rights relating to institutional conditions.[28]

The Third Circuit's holding firmly supports this Court's conclusion that courts are poorly equipped to make medical judgments. *Parham v. J.R.*, 442 U.S. 584, 606-09 (1979). The series of rights created by the majority are complex and confusing. Indeed, they impose conflicting obligations on those persons who must ensure their effectuation. As importantly, they improperly interfere with the exercise of professional judgment, providing "constitutional" answers to questions which are still hotly debated among experts (58a) (Seitz, C.J., concurring).

In this regard, it is important to note that as even plaintiff's expert was prepared to testify (101a), the use of restraints is an acceptable form of treatment. Likewise, the use of restraints may often provide protection

[28] The court also determined that expert testimony, excluded by the District Court as irrelevant, was relevant under the newly-created standards. The admissibility of the proffered testimony will depend on the standards ultimately developed, should review be granted in this case.

from harm, as well as protection for others. Yet, according to the Third Circuit, an otherwise appropriate use of restraints, whether for treatment or protection, is constitutionally prohibited absent "compelling necessity". In addition, other "acceptable" modes of treatment are prohibited unless determined to be the "least intrusive treatment available".

These standards require state officials, including administrators,[20] doctors and non-professional staff, to engage in a delicate balancing of constitutional rights in nearly every treatment decision. The difficult reality of caring for the mentally retarded does not lend itself to the neat and artificial divisions created by the court below. This is especially true when those "decision[s] must be made amid the cry and tumult of a mental hospital, not in the cloister of the Third Circuit law library, nor in the conference room of nine circuit judges who are divided five to four on a difficult problem" (73a) (Aldisert, J., concurring).

For example, according to the Third Circuit, a "few bruises" (a failure to protect a patient from harm) *might* be justified by a staff decision that "it is therapeutically more desirable to have an admittedly aggressive patient mingling with others instead of confined to an isolated cell" (26a, n. 38). The court did not explain how the

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[20] For example, in *Scott v. Plante, supra,* the Third Circuit found a basis for damage liability against the New Jersey Commissioner of the Department of Institutions and Agencies grounded solely on her knowledge of the conditions at a mental health institution and her failure to remedy them. That failure was not excused by her unsuccessful attempt to obtain the funds necessary to remedy those conditions. (Slip Opinion at 27, n. 16, 144a-145a, n. 16).

contrary decision—that confinement in an isolated "cell"[30] is "more desirable" in order to protect a patient or others from "bruises"—can be reconciled with the duty not to restrain a patient absent "compelling necessity" or the duty to use the "least intrusive treatment available".

Likewise, the Third Circuit's "least intrusive treatment" analysis requires a balancing of the possibility of improvement against the risk of serious side effects in choosing a treatment approach. The court, however, offered no meaningful guidance as to how this test should be applied by professionals in cases involving both risk and possibility of improvement, noting only that "[w]hen the state is the decision-maker . . . such actions should err on the side of safety" (32a, n. 45).[31] Since nearly all treatment involves some risk, this standard places all treatment personnel on the horns of a difficult constitutional dilemma. Moreover, since "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation . . .",[32] this is a dilemma best solved by avoiding risk at all costs, notwithstanding "accepted medical or scientific knowledge".

The Court of Appeals also failed to explain why malpractice becomes a constitutional violation merely because

[30] Cells, of course, exist in prisons, not mental retardation facilities. Thus, the lower court's reference to cells exemplifies its lack of understanding of the subject matter for which it nonetheless prescribed treatment standards.

[31] In contrast, "[w]hen individuals are the decision-makers the law, out of respect for personal autonomy, appears to allow them to err on the side of risk, *see Parham v. J. R.*, 442 U.S. 584, 602-04 (1979)" (32a, n. 45).

[32] *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring). See also *Bell v. Wolfish*, *supra* at 520 n. 40.

the victim is committed to an institution for the mentally retarded. See *Estelle v. Gamble, supra* at 106. The Constitution provides no "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis,* 424 U.S. 693, 701 (1976). Yet, the standards created by the Court of Appeals are, for the most part, indistinguishable from state law torts. This result is clearly inconsistent with the holdings of this Court in *Estelle* and *Paul.*

Finally, building upon its misconstruction of state law in *Halderman,* the Third Circuit converted a conceived statutory promise to provide appropriate treatment at Pennhurst into a substantive due process requirement. In so holding, the Third Circuit misconstrued both Pennsylvania law and constitutional requirements.

Under Pennsylvania law, treatment is not the only basis for commitment of the retarded. Rather, the mentally retarded can be committed when they are "in need of care ~~and~~ OR treatment." Pa. Stat. Ann. tit. 50 §4406(a).[33] Clearly, when a person, such as plaintiff, is committed as "in need of care", it is sufficient, under state law, to provide that care.[34]

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[33] In *Goldy v. Beal,* 429 F. Supp. 640 (M.D. Pa. 1976), a three-judge court declared Section 406 to be unconstitutional. Subsequently, a consent order was entered allowing commitment for a mentally retarded individual who is unable to provide "for his most basic need for nourishment, personal and medical care, shelter, self-protection and safety." *Goldy v. Beal,* C.A. No. 75-791 (M.D. Pa., filed Oct. 28, 1976) (Consent Order). Thus, plaintiff's continued commitment as "in need of care" is wholly consistent with the *Goldy* standard.

[34] See *In Re: Joseph Schmidt,* No. 23 March Term, 1979 (Pa. S. Ct., filed Feb. 5, 1981) (state has statutory duty to provide "care" to the mentally retarded).

As importantly, plaintiff (and most other residents of Pennhurst) is not "capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975). Accordingly, the provision of care—"food, shelter, medical care and supervision for which the residents have no other source"[35]—is a proper rationale for commitment and, even under the Third Circuit's substantive due process analysis,[36] provides the minimum constitutional standard of services for the mentally retarded. *Halderman v. Pennhurst, supra* at 125 (Seitz, C.J., dissenting).

Properly viewed, plaintiff's rights at Pennhurst are subject, at most, to an analysis similar to that employed by this Court in *Bell v. Wolfish, supra*. Even more so than prison administrators, those, such as defendants, who supervise the operation of mental retardation facilities are " 'expert administrators' " who should not be " 'second-guess[ed] . . . on matters on which they are better informed. . . .' " *Bell v. Wolfish, supra* at 544. Thus, if their actions are reasonably related to legitimate governmental interests—the provision of care or the effective management of the facility—due process requirements are satisfied.[37]

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[35] *Halderman v. Pennhurst, supra* at 125 (Seitz, C.J., dissenting). See also *Goldy v. Beal*, C.A. No. 75-791 (M.D. Pa., filed Oct. 28, 1976)(Consent Order).

[36] But see *O'Connor v. Donaldson, supra* at 587-88 (Burger, C.J., concurring); *Morales v. Turman, supra* (existence of a substantive due process right to treatment questioned).

[37] Moreover, the Third Circuit's substantive due process analysis is, at best, questionable. As Chief Justice Burger has noted, there is "no basis for equating an involuntarily committed

The extent of the lower court's error is evident from its attempts to distinguish this Court's holding in *O'Connor v. Donaldson:*

> [Unlike Donaldson, who received no treatment] Romeo has received some treatment; the state's desire to care for individuals incapable of protecting themselves provides an additional justification for confinement; and Romeo [unlike Donaldson] is not seeking release.

(29a-30a, n. 42). Thus, according to the Third Circuit, plaintiff, who received more and who was confined with greater justification, is entitled to far greater constitutional protection than the plaintiff in *O'Connor* because, in this case, plaintiff did not seek his liberty. This is a quantum leap in constitutional analysis which requires review by this Court.

B. After creating new constitutional rights, the court below erred in failing to direct dismissal on the grounds of qualified immunity.

This Court has repeatedly recognized that state officials have a qualified immunity from liability for constitutional violations unless they "knew or reasonably should have known" that their actions violated constitutional rights. See, e.g., *Procunier v. Navarette,* 434 U.S. 555, 561-62 (1978); *Scheuer v. Rhodes,* 416 U.S. 232, 247-

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patient's unquestioned constitutional right not to be confined without [procedural] due process of law with a constitutional right to *treatment.*" (Emphasis in original, footnote omitted.) *O'Connor v. Donaldson, supra* at 587-88 (Burger, C.J., concurring).

48 (1974).[38] As the Third Circuit recognized, this case "inhabits the twilight area of developing law concerning the constitutional rights of the involuntarily committed mentally retarded" (3a). The court went on, of course, to create rights far beyond those considered, let alone, found by any other court.

State "officials cannot be expected to predict the future course of constitutional law".[39] Thus, petitioners cannot be held to have known of the "new 'constitutional torts' manufactured . . . by the Third Circuit. . . ." (75a-76a) (Aldisert, J., concurring).

Accordingly, the failure of the court below to remand to the trial court with directions to dismiss this damage action was clearly erroneous. If the qualified immunity established by this Court is to have any significance, that failure should be reviewed by this Court.

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[38] There was no evidence to support a finding that the defendant supervisors intended to harm plaintiff. Thus, the second branch of the good faith immunity test is not at issue in this case.

[39] *Procunier v. Navarette, supra* at 562. *See also Wood v. Strickland*, 420 U.S. 308, 322 (1975).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 78-1982

ROMEO, NICHOLAS, an incompetent, by his mother and next friend, PAULA ROMEO,

Appellant

v.

DUANE YOUNGBERG, individually and in his official capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, individually and in his official capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, individually and in her official capacity as Unit Director, Unit 9, Pennhurst State School and Hospital

Appeal From the United States District Court for the Eastern District of Pennsylvania
(C.A. No. 76-3429)

Argued January 9, 1979

Before: SEITZ, *Chief Judge*, and
GIBBONS and HIGGINBOTHAM, *Circuit Judges*

Reargued April 28, 1980

Before: SEITZ, *Chief Judge*, and
ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS, GARTH,
HIGGINBOTHAM, and SLOVITER, *Circuit Judges*

(Filed November 24, 1980)

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

The present controversy inhabits the twilight area of developing law concerning the constitutional rights of the involuntarily committed mentally retarded. Nicholas Romeo appeals, through his next friend, from a jury verdict for the defendants, officials of the Pennhurst State School and Hospital, in a suit brought pursuant to 42 U.S.C. §1983 (1976). Plaintiff alleges trial errors in the admission and exclusion of evidence, in the court's instructions to the jury and in the manner in which the trial was conducted. Because of the improper exclusion of relevant expert medical testimony and critical flaws in the standards that were employed in charging the jury, we vacate the judgment of the district court and remand for a new trial.

While courts in the past decade have carefully focused on the procedural protections applicable to the initial commitment of the mentally handicapped, *see Addington v. Texas*, 441 U.S. 418 (1979); *Parham v. J.R.*, 442 U.S. 584 (1979), relatively little has been resolved with respect to conditions of confinement or the extent of the state's duty to protect and to treat the institutionalized. Specifically at issue here is the judicial responsibility to enforce constitutional guarantees governing the incarceration of the institutionalized retarded.[1] This, in turn, calls

[1] In *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3797 (1980) (Nos. 79-1404/1408/1414/1415/1489), this Court held that the mentally retarded have a statutory right to treatment and habilitation, enforceable by a private right of action under the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No.

on us to deal with the question of what standards of proof are required in a §1983 suit for damages, in which a mentally retarded plaintiff claims that the defendants improperly shackled him, failed to provide adequate protection for him, and did not make appropriate treatment available to him. In defining the principles relating to claims for protection and treatment of the retarded, carefully crafted instructions must be utilized that will reflect the duty of courts to safeguard the constitutional rights of those confined, but also will be sensitive to the prerogative of the medical community to exercise its professional judgment and to the undeniable fiscal and administrative concerns of the state.

I.

Romeo is a profoundly retarded person. Although he is physically thirty years old, he suffers from a chemical imbalance of the brain that renders his mental capacity approximately that of an eighteen month old child. For the first twenty-six years of his life Romeo lived with his parents in South Philadelphia. On May 10, 1974 his

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94-103, 89 Stat. 496, 42 U.S.C. §§6001-6081 (1976). Although confinement of the mentally retarded and mentally ill raises many similar problems for constitutional purposes, it is necessary to be careful not to submerge relevant distinctions. As both the district and appellate courts found in *Halderman*, with respect to the individuals housed in Pennhurst:

> The residents are not mentally ill, have broken no laws, and are not a danger to others, although, in severe cases, some are unable to care for themselves. Mental retardation is an impairment in learning capacity and adaptive behavior, and is not treatable, like mental illness, by means of drugs or psychotherapy. While the mentally retarded do suffer educational difficulties, the level of their functioning can be improved by individualized training. 612 F.2d at 92.

father died. Within a month his mother, finding herself unable to care for him, applied to the Philadelphia Common Pleas Court for his admission to a mental retardation facility. On July 11, 1974, the court committed Romeo to the Pennhurst State School and Hospital, pursuant to the involuntary commitment provision of the Pennsylvania Mental Health & Mental Retardation Act of 1966. Pa. Stat. Ann. tit. 50. §4406 (Purdon) (1969).

It is not contested that, while confined at Pennhurst, Romeo was injured on over seventy occasions. These injuries were both self-inflicted and the result of attacks by other residents, some in retaliation against Romeo's aggressive behavior. The injuries included a broken arm, a fractured finger, injuries to sexual organs, human bite marks, lacerations, black eyes, and scratches. Moreover, some of plaintiff's injuries became infected, either from inadequate medical attention or from contact with human excrement that the Pennhurst staff failed to clean up.

Since Romeo is incompetent, this action was brought on his behalf by his mother as next friend. The §1983 complaint seeks damages for the described injuries from three officials at Pennhurst: C. Duane Youngberg, then superintendent, Richard Matthews, director of resident life, and Marguerite Conley, director of the plaintiff's assigned unit at the time most of the injuries occurred. There is evidence which indicates that each defendant knew of some or all of the seventy-plus injuries suffered by Romeo.

After the case was filed, the district court permitted the plaintiff to amend the complaint to include allegations that, since the initiation of the suit, defendants had kept Romeo shackled to a bed or a chair in the hospital at Pennhurst for long periods each day. The amended complaint, which posited a violation of plaintiff's constitutional right

to treatment occasioned by the shackling, exposure to attacks and inappropriate treatment,[2] again sought compensatory and punitive damages from the defendants.[3]

At the time of trial, the district court refused to permit plaintiff's two experts, Dr. Foxx and Dr. Grover, to testify about the lack of programming and activities on Romeo's ward, which they believed accounted for the numerous injuries, and about alternative methods of treatment that would have reduced the frequency of attacks.[4] One of the experts would have testified further that the restraints served no medical purpose and were used solely for the convenience of the staff. The court sustained objections to all of this proffered medical and psychiatric testimony on the theory that admission of such evidence would transform a §1983 action into a malpractice case.[5] In addition, the court rejected the plaintiff's proposed jury

[2] The plaintiff's complaint and the various requests for charge do not describe the exact nature of the constitutional rights asserted by the plaintiff. For example, the plaintiff repeatedly refers to rights under the Eighth and Fourteenth Amendments. Inasmuch as the Eighth Amendment applies only to the states through the Fourteenth Amendment, it is at times unclear whether the Fourteenth Amendment is asserted as a separate legal basis or only ancillary to the Eighth Amendment theory. In any event, we have examined the record and will construe the complaint as asserting that the injuries inflicted on Romeo violated both a substantive due process right and a right to be free from cruel and unusual punishment.

[3] None of the defendants have contended on appeal that these allegations involve matters outside the scope of their assigned responsibilities at Pennhurst.

[4] The court requested an offer of proof and the proposed testimony was summarized out of the jury's presence.

[5] The court, however, did permit defendants to testify that Mrs. Romeo refused to authorize the use of a physical restraint program on plaintiff. Although defendants contended that this

instruction which maintained that the plaintiff had a right to treatment in the least restrictive environment. The court decided instead that defendants' shackling practices and duty to protect Romeo should be evaluated solely on the basis of an Eighth Amendment standard. Further, in what was described as an attempt to distinguish this §1983 suit from a malpractice case, the court subjected plaintiff's claims of inadequate treatment to an Eighth Amendment standard of "deliberate indifference to the serious medical needs of the resident."

Because we believe that the Eighth Amendment—which limits the scope of judicial review of conditions of incarceration for the criminally convicted to a "cruel and unusual" threshold—is inappropriate in the context of civil as distinguished from criminal confinement, the result reached in the district court must be vacated. Moreover, the uncharted legal issues which have arisen and the potential ramifications of this case impel us to set out in some detail the level of judicial scrutiny that should be accorded the intricate set of legal, medical and societal interests that intersect in the situation presented here.

II.

Of critical importance in this appeal is the recognition that this is a due process case, not a controversy to be

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prevented the reduction of Romeo's aggressive behavior, the rejection of a treatment program would not appear, in itself, to be probative evidence with respect to responsibility or liability. An inquiry is needed to determine the suitability of the proposed treatment, whether rejection of therapy is a manifestation of a patient's illness or a consequence of valid concerns of guardians or relatives, and whether reasonable efforts were made either to deal with such rejection or to provide some other suitable treatment. *Cf. Rouse v. Cameron*, 373 F.2d 451, 459 (D.C. Cir. 1966).

governed by "cruel and unusual" principles. Although the complaint alleged Eighth as well as Fourteenth Amendment violations, *Ingraham v. Wright*[6] and *Bell v. Wolfish*[7] would appear to preclude reliance on the minimal safeguards of the Eighth Amendment in a non-criminal context. *Ingraham* held that the Cruel and Unusual Punishments Clause is inapplicable in the context of corporal punishment in public schools; *Wolfish* found Eighth Amendment scrutiny inappropriate for evaluating conditions of pretrial detention.[8] Indeed, *Wolfish* explicitly recognizes a right of innocent persons to be free from punishment, a proposition directly grounded in the word "liberty" that appears in the Due Process Clause. *See* 441 U.S. at 535; *id.* at 580 (Stevens, J., dissenting). Thus, it is the Fourteenth Amendment's prohibition of the state deprivation of life, liberty or property without due process of law that is the appropriate fulcrum of our concerns today.

It is necessary, of course, to determine initially whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of life, liberty and property. If the answer to that inquiry is in the affirmative, we must then determine what level of judicial scrutiny is applicable to the various interests in issue here.

[6] 430 U.S. 651 (1977).

[7] 441 U.S. 520 (1979).

[8] See *Ingraham v. Wright*, 430 U.S. at 668-71; *Bell v. Wolfish*, 441 U.S. at 535. Admittedly, *Ingraham* left open the possibility of applying Eighth Amendment analysis to mental institutions, see 430 U.S. at 669 n.37, but the determination in *Wolfish* that Eighth Amendment is inappropriate for analyzing conditions of pretrial detainees indicates rather clearly that a formal adjudication of guilt in a criminal prosecution is a precondition for Eighth Amendment protection.

We are fully cognizant that the propriety of a §1983 claim, in the present situation, turns on whether a constitutional right is at issue. The concurrence is undeniably correct in requiring that we distinguish between constitutional violations and ordinary malpractice claims. But the implication that the existence *vel non* of a state remedy—for example a malpractice action—is relevant to the determination of whether a §1983 claim exists, would appear to be unfounded. *Cf. Paul v. Davis*, 424 U.S. 693, 715 (1976) (Brennan J., dissenting). Nor does the existence of treatment issues in a claim of constitutional infringement, on account of a linguistic similarity, transform the claim into a malpractice action.[9] Admittedly, the plaintiff's confinement in a state institution does not dignify every complaint with constitutional stature. *Cf. Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Nevertheless, there is a distinction for constitutional purposes between conduct by state actors and private citizens. Therefore, understandable concerns with stemming the federalization of common law tort actions, see *Baker v. McCollan*, 443 U.S. 137 (1979), must not overcome a court's duty to safeguard legitimate constitutional rights.[10] As Justice Harlan realized, " 'liberty' is not a series of isolated points pricked

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[9] Plaintiff Romeo stands in a different posture from the ordinary citizen with respect to medical treatment: he is involuntarily confined for the very purpose of treatment or habilitation. *See* pp. 12a, 22a-23a, 34a-36a *infra*. Unlike most members of the community he is not free to seek or reject medical services whenever he pleases.

[10] As the *Halderman* Court noted, although mental health policies have traditionally been within the states' police power, Congressional action in the field was justified by the constitutional underpinnings of the retarded residents' rights to protection and personal security. 612 F.2d at 98.

out in terms of [the Bill of Rights] . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion).

Once a protected interest is found to exist, the proper level of judicial scrutiny is ascertained by the nature of that interest. A court must not be overquick to equate the scope of the right to protection or treatment for the involuntarily confined retarded with the already articulated scope of such rights for the criminally incarcerated.[11] Nor are analogies to state or common law precedents controlling —it is federal law that answers the question of what process is due under the Constitution.[12]

The confinement of an individual to an institution for either the mentally ill or mentally retarded entails a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). In consequence it is circumscribed by

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[11] *See Estelle v. Gamble*, 429 U.S. at 106 (deliberate indifference standard adopted to distinguish medical malpractice cases cognizable under state tort law and those rising to level of constitutional abridgement with respect to prisoners). Although the concurring opinion purports to reject the deliberate indifference standard of *Estelle*, it is not clear that the standard which it advocates for judging constitutionally acceptable conduct—that it "was not a sham or otherwise illegitimate"—provides anything different, or realistically addresses the undeniable distinctions between an involuntarily confined retarded person's right and a convicted individual's right to protection or treatment.

[12] *Cf. Vitek v. Jones*, 48 U.S.L.W. 4317, 4320 (March 25, 1980); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

It should be noted, however, that if plaintiff's claim is not among those rights protected by the Constitution, he may still have a statutory or common law claim adjudicated in the state

due process protections. *Addington v. Texas*, 441 U.S. 418, at 425. And once inside the institution an individual's liberty interest is not summarily extinguished.[13] Rather, those aspects of personal autonomy recognized from the time of Blackstone—the power of locomotion without restraint and the right to personal security[14]—as well as the right to freedom from punishment, require continued respect. These fundamental liberties may be legitimately encroached upon only when justified by an overriding,[15] non-punitive state interest related to the reasons for confinement.

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courts or even in the federal courts under pendent jurisdiction. In *Halderman*, the Court held that retarded persons have both a private right of action under the Developmentally Disabled Assistance and Bill of Rights Act, and a state statutory right to habilitation. *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 97, 103, 107 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3797 (1980) (Nos. 79-1404/1408/1414/1415/1489).

[13] *See Wolff v. McDonnell*, 418 U.S. 539 (1973). The aphorism that "There is no iron curtain drawn between the Constitution and the prisons of this country," *id* at 555-56, would appear to carry equal force with respect to institutions for the mentally ill or the mentally retarded.

[14] Monaghan, Of *'Liberty' and 'Property,'* 62 Cornell L. Rev. 495, 411-12 (1977).

[15] *Cf. Bell v. Wolfish*, 441 U.S. 520, 532 (1979), which rejected a compelling necessity standard in holding that the "presumption of innocence" doctrine relied upon by pretrial detainees in that case did not state a sufficiently grave liberty interest to support such a rule. Although the majority in *Wolfish* suggested that even if detainees had relied on the right to be free from punishment, that right would not warrant adoption of the compelling necessity test, *id.* at 539, the situation of the confined mentally retarded is clearly distinguishable. Whereas pretrial detainees are incarcerated pursuant to a judicial determination of probable cause, the involuntarily committed mentally retarded

Courts have reached a general consensus on three legitimate state justifications for the confinement of the mentally ill and mentally retarded. These rationales have evolved historically from (1) the protection of society from individuals who constitute a danger, a concept rooted in the state's police power; to (2) the protection of individuals unable to care for themselves or prone to self-destructive acts, based on police power and *parens patriae* rationales; and finally to (3) rehabilitation—often limited to habilitation in the case of the mentally retarded—also an exercise of the state's *parens patriae* authority.[16] *See Addington v. Texas*, 441, U.S. 418, at 426; *O'Connor v. Donaldson*, 422 U.S. 563, 573-74 (1974).

Noticeably lacking, and logically inapplicable to the mentally retarded, are the traditional deterrence and retribution underpinnings of the criminal system.[17] Obviously, the state has no right to punish an innocent individual, and the concept of deterrence has a minimal effect on a severely retarded person, such as the plaintiff here. In

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are untouched by the criminal process. Moreover, 85% of the detainees were released within 60 days, *id.* at 524, 525 n.3, whereas persons in institutions for the mentally retarded often remain for life. When disabilities imposed in the course of confinement in a mental facility are as severe as shackling, the possibility of punishment—and a right to be free from it—in a constitutional sense, exists.

[16] This is not intended to suggest that a state may involuntarily confine a person solely on grounds of treatment when the individual does not desire any treatment.

[17] *See* In Re *Bally*, 482 F.2d 648 (D.C. Cir. 1973). *See also Bell v. Wolfish* at 539 n.20 and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), which view deterrence and retribution —the traditional aims of punishment—as outside the realm of legitimate nonpunitive governmental objectives.

seeking to explain claimed infringements of fundamental liberty interests, the state is limited to protection and treatment rationales of a compelling or substantial nature. Involuntary commitment in the civil context, then, quite clearly implicates a constitutional right to treatment and protection.[18] Alternatively, if a claimed post-commitment abridgement does not reach the status of a gross deprivation or squarely cut across constitutionally protected liberty interests, but only tangentially implicates such an important interest, a mutual accommodation between institutional objectives and constitutional provisions is needed. This is so since the very nature of an institution requires some limitation on the retained rights of those who are confined. *Cf. Wolff v. McDonnell*, 418 U.S. at 556. In such instances, security concerns, fiscal constraints and administrative necessities may be adduced to demonstrate

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[18] *O'Connor v. Donaldson*, 422 U.S. at 576 and *Robinson v. California*, 370 U.S. 660 (1962), at a minimum stand for the proposition that simple incarceration, outside of the criminal system, is constitutionally impermissible. Of course, the mentally ill and the mentally retarded cannot be segregated into discrete categories of "dangerous to others," "dangerous to self," or "need for treatment." The very fact of an individual's dangerousness is inextricably linked to his/her need for treatment. Both theoretically and practically then, treatment is a right and rationale in every instance of involuntary civil commitment.

However, it should be noted that with respect to Pennhurst, this Court fully adopted the district court's finding that "[t]he residents are not mentally ill, have broken no laws, and are not a danger to others, although, in severe cases, some are unable to care for themselves." *Halderman v. Pennhurst State School & Hospital*, 612 F.2d at 92. The absence of any dangerousness to others only strengthens the state's obligation to provide treatment to such non-threatening individuals once the state undertakes to confine them.

that a claimed encroachment is necessary to a facility's internal operations.[19]

III.

In the present case, Romeo's complaints may be appropriately conceptualized as (1) a right to be free from undue bodily restraint; (2) a right to personal security and protection; and (3) a right to adequate treatment. The first two are undiluted legal concerns, relating to protected liberty interests; as such, they are entitled to heightened judicial scrutiny. The third entails mixed questions of law and medical judgment, and thus requires a more flexible standard of judicial review and suitable deference to informed medical opinion.

The basis of Romeo's first claim, that he was unduly shackled,[20] is clearly inimical to the right of an unconvicted citizen to be free from punishment.[21] Even though shack-

[19] *Wolfish* pointed out that the problems that arise in the day-to-day operations of a state institution are not susceptible of easy solutions. Courts undoubtedly should accord wide-ranging deference to the administrators and physicians in mental facilities with regard to the adoption and execution of policies and practices necessary for internal order and security. Normally, the expertise and responsibility for such operations are located in the legislative and executive branches. But such recognition would appear to be no justification or excuse for the abrogation of legal rights or the abandonment of the judicial obligation to protect such rights. *See id.* 441 U.S. at 541.

[20] The fact that Romeo was shackled is not disputed. *See* App. 1-15a and 1-21a.

[21] Pa. Stat. Ann. tit. 50 §4422 actually forbids shackling, subject to two limited exceptions: (1) during transfer of a patient or (2) by order of the director or his designee for solely medical purposes in accordance with regulations of the department. The record does not disclose that defendants came within either of these two exceptions. *See* App. 1-63a.

ling may not be punishment per se, it raises a presumption of a punitive sanction.[22] It squarely collides with a traditional liberty interests in freedom from bodily restraint.[23] A valid involuntary commitment *ex necessitate* extinguishes a retarded person's right to freedom from confinement. Nevertheless, a residuum of liberty remains which is entitled to due process protection. In *Vitek v. Jones,* which dealt with the transfer of a prisoner from a prison to a mental hospital, the Supreme Court found that an involun-

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[22] Moreover, as *Wolfish* conceded, were a detainee to be shackled and thrown in a dungeon, "it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish." *Id.*, 441 U.S. at 539 n.20.

In the present case, the district court permitted Romeo to amend his complaint to include allegations that defendants had kept plaintiff shackled to a bed or chair in the Pennhurst hospital for long periods of time each day since the initial filing of the complaint. *See* App. 1-15a. Although evidence of retaliation or the subjective motivation of defendants may aid in determining whether there has been punishment or in ascertaining an appropriate remedy, the question whether a constitutional right to freedom from punishment or bodily restraint has been violated should turn on the *character* of the punishment not the *motivation* of the officials. *Cf. Estelle v. Gamble,* 429 U.S. at 116. (Stevens, J., dissenting).

[23] Freedom from personal restraint was essentially all that due process "liberty" meant until the Civil War. *See* Shattuck, *The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect 'Life, Liberty, and Property.'* 4 Harv. L. Rev., 365 (1891). This is the same liberty that the Court in *Addington,* 441 U.S. at 425-27, sought to protect by establishing a "clear and convincing" evidence standard for initial commitment proceedings with respect to the mentally ill.

tary commitment to a mental hospital is "qualitatively different from the punishment characteristically suffered by a person convicted of crime." 48 U.S.L.W. 4317, 4321 (March 25, 1980). Despite pre-existing confinement, a substantial, additional loss of liberty occurred, for which the Court required observances of due process safeguards. Similarly, in the situation before us, shackling is not normally within the range of conditions of confinement contemplated in habilitative institutionalization.[24] Neither in *Vitek* nor in the case at hand do the asserted privations inhere in the original rationales for confinement. Because of the fundamental right at issue here, as well as the substantial risk of error[25] and the possibility of significant harm, the proper judicial posture is one of careful scrutiny.[26]

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[24] The analysis here and the reasoning in *Vitek* indicate that courts have a duty to guard against unnecessary personal restraints both at the confinement stage and with respect to later, intramural dispositions, which can range from maximum to minimum security. The Fourteenth Amendment does not cease protecting individuals simply because they are behind institutional gates. In *Halderman v. Pennhurst*, 612 F.2d at 112-13, this Court affirmed a portion of the district court's order mandating limitations on the use of physical and chemical restraints.

[25] In the present situation, the state, in fact, admitted that the use of restraints was subject to a special procedure, requiring, at the least, an order of a physician. App. I-63a. In addition, according to the statute, a physician's order should be supplemented by an order of the institution's director. *See* n.21 *supra*.

[26] *Mathews v. Eldridge*, 424 U.S. 319 (1976), elaborated a three-part balancing inquiry which would indicate the procedural protections required by state action or by a decision such as we have here:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such

Plaintiff requested that his shackling claim be analyzed under the rubric of a "right to treatment under the least restrictive conditions consistent with the purpose of the commitment." In this regard, he submitted the following charge:

> Plaintiff contends that he was shackled to his bed or chair for long periods of time each day after he filed this lawsuit. If you find that he could have been provided treatment under less restrictive conditions than those imposed on him, then you must find that his constitutional rights were violated.

The court, however, gave the following instruction:

> In order to prove his case the plaintiff must show acts or omissions sufficiently harmful to evidence a deliberate indifference to the serious medical needs of the resident. It is only such indifference that can offend the standards of decency required by the 8th Amendment. App. 2-236a—2-237a.

We have already recorded our disapproval of the adoption of the Eighth Amendment standard in the mental

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interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail. *Id.* at 334-35.

The applicable level of judicial review may also be determined by a similar weighing of relevant interests. Here, the individual interest in freedom from shackling is considerable; the risk of erroneous shackling is indicated by the institution's failure to follow its own procedures; and the state has no plausible, independent interest in shackling per se, since the state statute generally forbids such practices.

retardation area. However, we cannot assent as the concurrence suggests, to an analysis which scrutinizes shackling and a right to treatment by a standard that is essentially the same. The Pennsylvania statute generally prohibits such shackling practices, see fn. 21, and similarly, mental retardation professionals have relegated the use of physical restraints to the closets of an earlier age. Logically, Romeo's shackling claim centers on a liberty interest: a right to be free from bodily restraint.

The trial judge, therefore, should instruct the jury that such shackling may be justified only by a compelling necessity, *i.e.*, that the shackling was essential to protect the patient or to treat him. It should be explained that, except in emergency situations, inadequate resources or administrative rationales offer an insufficient basis for intrusions of this kind on a fundamental liberty interest. As the courts have repeatedly proclaimed, "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations." *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, J.), quoted in *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972) quoted in *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974). Plaintiff is also entitled to a charge, in the alternative, that to absolve the defendants from liability on the shackling claim it would be necessary to find that shackling was the least restrictive method of dealing with the patient,[27] in light of his prob-

[27] The "compelling necessity" and "least restrictive manner" tests are virtually indistinguishable standards for reviewing the conduct in question. They have been used interchangeably in resolving equal protection, due process and First Amendment claims. *See Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963).

lems and the surrounding environment. A "least restrictive" charge will not only insure that compelling treatment explanations, as opposed to fiscal concerns or staff convenience, were the basis for the shackling, but also that the institution considered and rejected alternative methods of restraining the resident, if some restraint indeed was required.[28]

A comparison with the result that might be obtained by employing the unitary standard proposed by the concurrence is apposite here. Under the standard advanced by the concurrence, the jury would be charged that shackling is permissible so long as there was not "such a substantial departure from accepted professional judgement, practice or standards as to demonstrate that the defendants did not base their conduct on a professional judg-

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[28] While it will be explained later that "least restrictive" analysis does not appear to be an appropriate tool for evaluating ongoing treatment programs, the reservations regarding this standard expressed in §V *infra* are inapplicable to shackling claims. Shackling—a discrete physical act of confinement—is more analogous to an initial commitment than to the administration of an evolving medication program. Courts are competent in judging alternative environmental dispositions, ranging from outpatient services to confinement in a large state facility. *See Halderman*, 612 F.2d 84, 102 (3d Cir. 1979) (Congressional preference in Developmentally Disabled Assistance and Bill of Rights Act for establishing least restrictive standards for personal liberty). Shackling presents a similar question of degrees of physical restriction and is equally amenable to judicial measurement. And just as the Supreme Court sought to protect the substantial liberty interests implicated in an involuntary commitment proceeding by establishing a "clear and convincing" evidence test, see *Addington v. Texas*, 441 U.S. 418, 433 (1979), the comparably tangible and fundamental threat to personal autonomy presented by shackling should be protected by a "compelling necessity" test.

ment." Arguably, such an instruction assumes that physical restraint for the convenience of the staff would constitute a substantial departure from accepted professional judgment. Yet it is not logically evident that concerns of staff convenience are the sort of departures from medical judgment that rise to the level of being a sham or otherwise illegitimate, as defined in the concurring opinion. More fundamentally, although the standard proposed by the concurrence would probably prevent use of shackling as punishment,[29] it would not preclude its use as a substitute for more effective treatment programs. Thus such a standard would fail to give adequate weight to the resident's substantial interest in freedom from bodily restraint. In addition, it would conflict with the thrust of the state's interest as proclaimed in §4422 of the Mental Health and Mental Retardation Act, in prohibiting the use of mechanical restraints except in limited situations.

Our holding that the district court erred with respect to the jury instruction for the shackling claim, and our establishment of a compelling necessity standard for review of such troubling interferences with bodily freedom, necessarily require an additional finding of error in the district court's exclusion of relevant expert testimony. Under the compelling necessity or least restrictive standards of proof, both sides are, of course, permitted to ad-

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[29] Indeed, "there are a number of psychiatrists and psychologists who regard punishment as a legitimate form of therapy and who believe that aversive behavior modification techniques may be freely used to satisfy a patient's right to treat." *Cf.* Schoenfeld, *Recent Developments in the Law Concerning the Mentally Ill—A Corner-Stone of Legal Structure Laid in Mud*, 9 Univ. of Toledo L. Rev. 1, 17 (1977); Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 Yale L.J. 87, 106 (1967).

duce evidence. Although defendants must justify the shackling as the least restrictive means of handling or protecting the individual, the plaintiff may produce evidence, for example, that restraints were utilized largely because of convenience to the staff. Consequently, Dr. Foxx's proffered testimony regarding the inappropriate reasons and counterproductive results connected with the restraint of Romeo, was improperly excluded by the trial court.

IV.

From Colonial times to the present day, the concept of liberty has embraced the "right to be free from and to obtain judicial relief for unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). Plaintiff's second claim, the right to protection from attack, undeniably falls within the compass of this right. The record discloses that while confined at Pennhurst Romeo was injured on over seventy occasions. Some of these injuries were self-inflicted, some resulted from attacks by fellow residents, and some may even have been by the staff. The evidence also suggests that the defendants knew, or had reason to know, of some or all of the injuries suffered by the plaintiff. It would be anomalous to find that the right to a secure environment, which federal courts have often intervened to protect in the context of penal institutions, did not extend to facilities for the mentally retarded [30].

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[30] The judiciary has recognized that "our constitutional duties require that the courts be ever vigilant to assure that the conditions of incarceration do not overstep the bounds of federal constitutional limitations." *Campbell v. Beto*, 460 F.2d 765 at 767-68 (5th Cir. 1972) quoted in *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974). *See also Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971). Further,

The scope and nature of the right of the plaintiff to protection from attack is also capable of judicial demarcation. Both the individual's right to personal security and the state's interest in providing care converge to support a right to protection from attack. The state cannot simply confine a person, without more, because he may be a danger to himself or to third parties.[31] Only after the commission of a discrete criminal act and conviction in accordance with procedural protections is incarceration without more warranted. Consequently, in order to survive constitutional scrutiny, involuntary commitment of a mentally retarded person must combine an interest in insulating society from dangerous behavior with a promise, either express or by implication, to care for and treat the individual.[32] Alternatively, the commitment of a retarded person for treatment purposes or because he is unable to care for himself, necessarily entails the provision of care and protection. The *parens patriae* power to provide care and protection is thus inextricably bound up in the invol-

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in *New York St. Ass'n for Retard. Child., Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), the court noted that "One of the basic rights of a person in confinement is protection from assaults by fellow inmates or by staff." Although initial discussion of the right occurred in a prison setting, the court in *Rockefeller* employed the same standard in evaluating the institution for the mentally retarded in that case.

[31] In a somewhat analogous situation *Robinson v. California*, 370 U.S. 660, 666 (1962), held that incarceration on account of mere status is constitutionally impermissible.

[32] Commitment based on reasons of dangerousness to others is, admittedly, more often a concern in confinement of the mentally ill and less likely to be a governing factor with respect to the mentally retarded. As noted in n.18 *supra*, the district court found that none of the Pennhurst residents were dangerous to others.

untary commitment of the retarded regardless of the original rationale for the confinement.

Further, in Romeo's case, commitment was pursuant to Penn. Stat. Ann. tit. 50, Mental Health and Mental Retardation Act of 1966. The state, in confining Romeo, represented that it was "willing and able" to care for him.[33] The statute provides an entitlement to protection[34] which, like other state-created entitlements, is guarded by constitutionally acceptable procedures. The right to protection is not activated by an isolated mishap, or called into question by each bruise that a patient may suffer. But a pattern of attacks, injuries or violent behavior such as we have here would create a claim to such a right. While no one is guaranteed an injury-proof life, Romeo, as an involuntary committed resident of Pennhurst, had a right to humane care and protection, bottomed both on the Pennsylvania statute and the Constitution.

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[33] Pertinent for present purposes is §4401 which provides: "(c) whenever a court commits any person under any provision of this act, it may commit such person directly to a facility *willing and able* to receive him; otherwise, the court shall commit to a designated local or state facility, or to the Veterans Administration or other agency of the United States upon receipt of a certificate that the person is eligible for such hospitalization and there is available space for his care." (emphasis added)

[34] While both the right to protection and the right to treatment may have characteristics of property entitlements in that they demand affirmative action from the state and are statutorily created expectations, they are also equally intertwined with the original loss of liberty through confinement and related to basic notions of human dignity. Therefore treatment and protection partake of both liberty and property interests, and it seems unnecessary, at least in the present context, to demarcate these rights in a narrow "either/or" fashion.

Institutions for the mentally retarded are rarely "open" facilities. Those involuntarily confined are not free to return home, and indeed, many are bereft to any support by family and friends.[35] This absence of openness or significant community surveillance and oversight underscores the need for the courts to discharge their traditional function of safeguarding constitutional rights.[36]

Therefore, with respect to the protection claim, we conclude that the trial court erred in its charge. It instructed the jury that:

> Under the 14th . . . Amendment, state official at a state mental hospital have a duty to protect involuntarily committed residents from repeated attacks by other patients and staff.
>
> Plaintiff . . . contends that these defendants violated such a duty to protect him because they were aware of such attacks and failed to take such reasonable steps as [were] required to protect him.
>
> *If you find that the defendants were deliberately indifferent to the medical and psychological needs of [the plaintiff], then you may find that plaintiff's . . . 14th Amendment rights were violated.*

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[35] The mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude. *Cf. United States v. Caroline Products*, 304 U.S. 144, 152-53 n.4 (1938). The retarded cannot vote in most states and, with few community ties, sponsors or friends, have minimal impact on the political process. *See J. Ely, Democracy and Distrust*, 135-79 (1980).

[36] *Cf. Ingraham v. Wright*, 430 U.S. 651 (1977) (openness of schools to public scrutiny ensures effectiveness of common-law remedies in deterring abuses).

> To find for the plaintiff you need not find that the defendants personally participated in any attack upon the plaintiff. If you find that the defendants were aware of repeated attacks upon plaintiff and failed within their sphere of authority to take *reasonable steps* to protect the plaintiff, then you may find that the defendants are liable for a violation of the plaintiff's constitutional right. (emphasis supplied)

As we see it, the jury should be informed that the plaintiff has a right to have his physical safety protected. The plaintiff sought an instruction that defendants had an obligation to "take reasonable steps to protect plaintiff." Chief Judge Seitz maintains that such a charge is virtually indistinguishable from a state malpractice standard. *Infra* at 56a. However, analysis of this particular claim for constitutional purposes would proceed as follows: because this is a fundamental interest—which conflates plaintiff's right to personal security with defendants' duty to protect—if the defendants failed to provide for Romeo's personal security, such failure can be justified, in a §1983 case, only by substantial necessity. Substantial necessity is more appropriate than the compelling necessity standard employed in connection with the shackling claim, for it enables a court and jury to distinguish between isolated incidents and inadvertent accidents, on the one hand, and persistent disregard of patients' needs, on the other.[37] If the defendants disregarded plaintiff's in-

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[37] Such a distinction is neither arbitrary nor unprecedented. In a similar effort at line-drawing, the Supreme Court in *Baker v. McCollan*, 443 U.S. 137 (1979), attempted to give meaning to an earlier pronouncement that "Due process does not require that every conceivable step be taken at whatever cost to eliminate the possibility of convicting an innocent person." Id. at 145, *citing*

juries or failed to take steps to protect plaintiff then they should be liable unless they can offer explanations based on important state interests.[38] However, the least restrictive charge, which is applicable to the shackling claim, is a less meaningful analytic tool in the protection setting because of the very existence of a right to personal security and a duty on the part of the state to protect. We cannot assume that all patients desire and are capable of dealing with the freedoms provided by least restrictive treatment. Moreover, inherent inconsistencies arise in the use of such a concept in the protection area. The least restrictive treatment, which might be the least confining, might provide insufficient protection and care for a particular resident's wants and needs.

In view of the stance we have adopted regarding the plaintiff's right to personal security and protection from attack, we hold that it was error for the district court to exclude the testimony of Dr. Foxx and Dr. Grover con-

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Patterson v. New York, 432 U.S. 197, 208 (1977). In *Baker* the Court found that detention for three days did not constitute a liberty deprivation, but that "mere detention pursuant to a valid warrant in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law.'" 443 U.S. at 145. Here, we do not require that every conceivable step be taken to prevent a resident from ever becoming bruised. Rather, we recognize that 70 injuries may rise to the level of a cognizable constitutional claim.

[38] For example, the staff might determine that it is therapeutically more desirable to have an admittedly aggressive patient mingling with others instead of confined to an isolated cell. Although this finding would not absolve the defendants of their duty to protect, it might well explain incurring some bruises in the course of a comprehensive treatment goal.

cerning the availability of treatment programs which would minimize the aggressive behavior and attacks that were unnecessarily prevalent at Pennhurst. Such evidence is relevant in enabling the jury to resolve whether the defendants were properly attending to, or overlooking, the right of the plaintiff to protection from attack.[39]

V.

Plaintiff's third complaint turns essentially on a claim of inadequate treatment and a right to treatment in the least restrictive manner. As previously observed, unlike a right to freedom from bodily restraint or to personal security, treatment does not present a purely legal issue. *See* p. 14a *supra.* Questions of a court's relative competence concerning medical decisions and respect for medical judgment, as well as concerns of comity with the legislative and executive branches, place this claim in a different perspective. The move from preventing degrading impositions on human dignity, such as shackling and exposing a resident to continuous attacks, to requiring treatment consonant with individual needs, transfers the court to a subjective realm of decision making. Nevertheless, appropriate deference to medical expertise does

[39] It is questionable whether this testimony would be admissible under the standard advanced by Chief Judge Seitz. Dr. Foxx was prepared to testify that "in his opinion, plaintiff's injuries were a direct result of the lack of programming and activities on the ward." Dr. Grover's opinion was, similarly, that the "excessive and potentially mutilating" injuries were a consequence of inappropriate programming. It is not clear whether either would be ready to testify that the programming was "such a substantial departure from accepted professional judgment" as to constitute "a sham," the test suggested by the concurring opinion.

not diminish the judicial duty to safeguard liberty interests implicated in treatment decisions.

The right to treatment—or habilitation in the case of the mentally retarded[40]—arises when an individual is involuntarily committed, regardless of whether *parens patriae* or police power grounds provide the major premise for the confinement. *See*, pp. 12a, 21a-23a *supra*. A court performs two functions with respect to such a right: it requires that treatment be provided to those who require and are willing to accept it, and it places limits on the

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[40] Although habilitation is the more accurate term for treatment of the mentally retarded this is not intended to negate the possibility of improvement or to convey a static image of the functioning abilities of retarded persons. To the contrary Congress appears to have based the Developmentally Disabled Assistance and Bill of Rights Act, as well as other recent legislation affecting the mentally retarded, on an acceptance of a "developmental view" of the severely retarded now being advanced by retardation professionals. The Senate Report accompanying the Bill of Rights articulates the developmental view, as well as contending traditional views which the Congress rejected. In part, S. Rep. 94-160 at 27-28 says:

> . . . . Finally, there is the view that developmentally disabled individuals are 'diseased.' They are viewed as sick and in need of constant care. This leads to indefinite custodial care. This last model is gradually being replaced by a developmental view of mental retardation. Such a view stresses that all developmentally disabled individuals have potential for learning and growth.
>
> From this developmental model, it follows that custodial care —which is predicated on the assumption that certain individuals are essentially incapable of development—must be rejected. The newer developmental model emphasizes concrete program goals for individuals and therefore encourages evaluation based on specific outcomes.

state's power to impose such treatment on those who do not desire it. A right to treatment does not create a corresponding duty to submit to any treatment whatsoever; such a simple equation would sanction unacceptable invasions of personal autonomy.[41]

At one end of the spectrum, an absolute failure to treat, when treatment is the reason for commitment, raises clear and serious constitutional problems. As the Court noted in *O'Connor v. Donaldson*, 422 U.S. 563 (1974), "where 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that courts are powerless to determine whether the asserted ground is present." *Id.* at 574 n.10. In such instances, it is the court's duty to insist on appropriate treatment or that the plaintiff be released.[42] At the other end of the spectrum is the judicial role in dealing with

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[41] *See* Katz, *The Right to Treatment—An Enchanting Legal Fiction?* 36 U. Chi. L. Rev., 755, 766 (1969).

[42] In *Donaldson* the jury found that "Donaldson was neither dangerous to himself nor dangerous to others, and also found that, if mentally ill, Donaldson had not received treatment." *Id.* at 573. Since there was no conceivable ground for confinement and Donaldson sought release, the Court held that Donaldson's constitutional right to freedom had been violated. That case is distinguishable from Romeo's insofar as: Romeo has received some treatment; the state's desire to care for individuals incapable of protecting themselves provides an additional justification for confinement; and Romeo is not seeking release. Admittedly, the situation with a mentally retarded person is different from that of a mentally ill person. Confinement for the latter is frequently of short duration, while confinement of the former is of considerably longer duration. In addition, treatment of the mentally ill may be more central than for the mentally retarded, for whom habilitation may

involuntary treatment which occasions severe intrusions on individual dignity. Nonreversible physical operations, such as a vasectomy, or permanent physical alterations by surgical intervention, such as a prefrontal lobotomy, or the administration of powerful antipsychotic drugs may well constitute fundamental liberty violations.[43] Like shackling, it may be that they should be subject to close court scrutiny.[44] Similarly, the reasons which commend the use of least restrictive analysis with respect to shackling—existence of a judicially assessable, discrete act, which entails a significant loss of individual liberty—may

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be the prime factor. But while the mentally retarded are not curable as such, few are totally untreatable—as may well be the case with some who are mentally ill. Therefore, instances in which no effective therapy exists, and in which treatment would be futile, potentially requiring a *Donaldson*-like release, are more likely to arise with the mentally ill. *Cf.* Schoenfeld, *supra* note 29, at 15-17.

[43] Because of the incomplete state of the record, it is unclear whether the administration of, for example, dangerous psychotropic drugs, which were found to be misused at Pennhurst, see *Halderman v. Pennhurst*, 612 F.2d at 93, is in issue with respect to plaintiff Romeo. In light of the fact that we are remanding this case, which has already consumed considerable judicial time, we deem it appropriate to address the panoply of possible treatment problems that may confront the district court, in order to aid in a speedier disposition.

[44] *Cf. Davis v. Hubbard*, No. C 73-205 (N.D. Ohio, filed Sept. 16, 1980), which undertakes an exhaustive examination of psychotropic drug use in institutions for the mentally ill and suggests that administration of such drugs, as well as *inter alia*, convulsive therapy, sterilization, and psycho-surgery, involve significant invasions of fundamental interests worthy of constitutional protection. Traditional treatments, the court noted, do not implicate these interests to the same degree.

be present in the context of such invasive, involuntary procedures. Since some these procedures may not be present in the case at hand after it is remanded, we do not address the subject in any detail except to note the possibility of its existence. But, whenever unalterable interferences with bodily integrity place deprivations of liberty in issue, the law and not medicine is the ultimate decision-maker.

Once analysis transcends the groundlevel question of treatment *vel non*, however, and settles in the middle ground, legal questions of unconstitutional liberty deprivations begin to merge with medical judgments regarding the appropriateness of the regimen. Inasmuch as we are remanding, *inter alia*, because the district court's improper employment of Eighth Amendment scrutiny resulted in the exclusion of the plaintiff's proffered medical testimony, it is uncertain how the record will develop at trial. However the summaries of medical testimony, offered as proof out of the hearing of the jury, suggest that the trial court may need guidance in a range of situations, involving problems of both intrusive and inadequate treatment. We therefore find it in order to delineate the legal standards and jury charges applicable in the treatment realm.

Where the issue turns on which of two or more major treatment *approaches* is to be adopted, a "least intrusive" analysis may well be appropriate. If the staff decides upon a course of treatment which offers some promise of effectiveness without undue risk to the patient, such decision may well come within the ambit of least intrusive means. If the likelihood of serious side effects does exist, however, and substantial improvement is not reasonably expectable, then such judgments might well present a basis for finding that the course of treatment was not the least

intrusive under the circumstances.[45] In making constitutional judgments in such situations, the court must necessarily depend in large measure on medical evidence. Once the least intrusive regime has been selected, therefore, the application of a constitutional standard of "least intrusive alternative" on continuing treatment programs, which often involve qualitative medical determinations subject to daily, possibly hourly changes, would prove unworkable.[46] The

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[45] Of course, this does not dispose of those difficult mid-range situations which involve both the possibility of improvements and the risk of serious side effects. When individuals are the decision-makers the law, out of respect for personal autonomy, appears to allow them to err on the side of risk, see *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979). When the state is the decision-maker, the converse would seem appropriate: such actions should err on the side of safety.

[46] The significant cases embracing the least restrictive concept as a constitutional principle primarily entail a single legislative enactment or a discrete state action. *See, e.g., Illinois State B. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (statute prescribing number of signatures required for listing on electoral ballot); *Wooley v. Maynard*, 430 U.S. 705 (1977) (statute requiring noncommercial vehicles to bear license plates with "Live Free or Die" motto); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964) (statute prohibiting issuance of passports to all members of Communist organizations); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (statute requiring teachers to disclose all organizations to which they belong or which they support); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (ordinance requiring pasteurization of milk at approved plants within five miles of center of city).

Where the term "least restrictive" has been applied to the mentally handicapped, it has had reference mainly to the initial environmental disposition not to ongoing therapeutic regimes or medical prescriptions. *See Welsch v. Likins*, 550 F.2d 1122, 1126 n.6 (8th Cir. 1977), *aff'g in part, vacating and remanding in part,*

judiciary is not in a particularly advantageous position to determine which of two medications is less intrusive, nor especially competent in assessing present therapeutic benefits versus long-term consequences and side effects for each administration of a drug. Further, least restrictive assumes a direct correlation between restrictiveness and effectiveness, a presumption which can not be medically corroborated in every instance.[47]

Unfortunately, in attempting to craft the appropriate standard to apply to a charge of inadequacy of treatment the courts find themselves in a Scylla and Charybdis situation. On the one hand, the Supreme Court has cautioned that,

> Although we acknowledge the fallibility of medical and psychiatric diagnosis, (citation omitted) we do

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373 F. Supp. 487 (D. Minn. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 473, *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974); *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part sub nom. Wyatt v. Alderholt*, 503 F.2d 1305 (5th Cir. 1974).

[47] *See* Hoffman & Foust, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses*, 14 San Diego L.R. 1100, 1141-42 (1977).

In evaluating the meaning of the right to treatment, it is equally important to assess a program in terms of its adequacy—and a highly relevant factor is the resident's opinion of, and reaction to, the treatment he is receiving. It is by no means clear that an individual resident would consider the least restrictive treatment to be the most adequate. *See* Katz, *The Right to Treatment—An Enchanting Legal Fiction?* 36 U. Chi. L. Rev., 755, 780 (1969).

> not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or adminsitrative hearing officer. . . . the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real.

Parham v. J.R., 442 U.S. 584, 609 (1979). On the other hand, the Supreme Court has noted that "The medical nature of the inquiry, however, does not justify dispensing with due process requirements." *Vitek v. Jones*, 48 U.S.L.W. 4317, 4321 (March 25, 1980), *citing Addington v. Texas*, 441 U.S. at 430. Although both these statements refer to initial commitment procedures for the mentally ill,[48] their logic appears equally applicable to judicial review of treatment decisions within institutions for the mentally retarded.

In the present case Romeo was confined pursuant to §406 of the Pennsylvania Mental Health & Mental Retardation Act of 1966, which provides that commitment is for "care and treatment."[49] By basing Romeo's deprivation of liberty at least partially upon a promise of treat-

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[48] *Parham* established minimal procedures consistent with the Fourteenth Amendment for the voluntary commitment of mentally ill minors. *Vitek* prescribed the procedures due before the state can transfer a convicted person from prison to a mental hospital.

[49] (b) If upon examination it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may order the commitment of such person for care and *treatment*. (emphasis added) Pa. Stat. Ann. tit. 50, §4406

ment, the state ineluctably has committed the community's resources to providing minimal treatment. While Romeo has an entitlement to some treatment,[50] the evidence in the record, although somewhat contradictory, suggests not so much a total failure to treat as an inadequacy of treatment.[51]

Given this situation it would be unrealistic for us to ignore that courts by and large are not in as advantageous

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On July 8, 1976, §4406 was declared unconstitutionally void for vagueness in *Goldy v. Beal*, 429 F.Supp. 640 (M.D. Pa. 1979), although the legislature, in enacting the 1976 Mental Health Procedures Act, P.L. 817 on July 9, 1976 specifically provided that the provisions of the Mental Health and Mental Retardation Act of 1966 (§4401 et seq.) were preserved insofar as they relate to mental retardation or to persons who are mentally retarded. In order to continue commitments constitutionally under §4406 the Department of Public Welfare consented to an October 28, 1976 order of the district court which established standards for involuntary commitment. These standards ("Goldy standards") are legally binding regulations which enhance the §4406 provision. In conditioning commitment on a person's inability to provide for "his most basic need for nourishment, personal and medical care, shelter, self-protection and safety" the regulations represent that such needs will be provided by residential placement. *See* 6 Penn. Bull. 2884 (Oct.-Nov. 1976).

[50] Similar to the right to protection and care, the right to treatment has both a constitutional base—since it forms the ground for the initial liberty deprivation and also a statutory base. It can likewise be analyzed as a liberty interest or property entitlement. *Cf. Brede v. Director for Dept. of Health, Etc.*, 616 F.2d 407 (9th Cir. 1980) (property entitlement to treatment at some state leprosarium).

[51] Of course, if after receipt of the relevant medical testimony on retrial, it is ascertained that Romeo received no treatment during significant periods, then the jury should be charged in accordance with Appendix III A not III B.

a position as the personnel at applicable institutions to make decisions relating to day-to-day or hour-to-hour treatment.[52] Moreover, the evaluation of standards of adequacy and suitability in the psychiatric field is extremely difficult even for trained personnel and certainly in the judicial context. Questions in this field, as the Court in *Addington* noted, often require not only a resolution of complicated factual issues, they turn on the very *meaning* of those facts —a meaning that must be interpreted by expert psychiatrists and psychologists. 441 U.S. at 429.[53] And unquestionably, the gap between available resources and those needed for ideal treatment programs is, unfortunately, considerable. Once minimum treatment needs are satisfied, courts should be cautious in requiring legislatures to allocate resources in a way that may well be more desirable, but not constitutionally mandated.[54]

Consequently, with respect to the claim regarding adequacy of treatment, we agree neither with the plaintiff, that he has a right, insofar as day-to-day decisions are concerned, to judicial review based on a constitutional

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[52] *See generally,* Bazelon, *Foreword,* 57 Geo. L. J. 676-79 (1969).

[53] It has been contended that these medical uncertainties are greater with respect to the mentally ill, on which *Addington* focused, than in the case of the mentally retarded. For constitutional purposes, this difference would appear insignificant, insofar as a "medically reasonable" standard for ongoing treatment decisions would appear proper for both groups.

[54] *Cf. San Antonio Independent School District v. Rodriquez,* 411 U.S. 1 (1973); *Dandridge v. Williams,* 397 U.S. 471 (1970). Although both were Equal Protection cases, they dealt with an analogous question of what constitutes an adequate provision of public services or funds.

standard of least intrusive,[55] nor with the defendants that only deliberate indifference to the medical and psychological needs of Romeo constituted a violation of his right to treatment.[56] It should be made clear to the jury that

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[55] While least intrusive analysis is relatively easily applied when the liberty interest infringed is freedom from bodily restraint, in the case of shackling, or involves conditions of confinement—minimum vs. maximum security—*see Halderman, supra; Eubanks v. Clarke*, 434 F.Supp. 1022 (E.D. Pa. 1977), it merges into questions of medical judgment when the most appropriate method of administering treatment arises. This is not to suggest that such analysis may not be desirable: "least intrusive" may well be the most effective tool for reconciling the treatment needs of individuals, the concerns of libertarians and questions of the proper allocation of limited state funds. Chief Justice Burger's concern in *O'Connor*, that a "right to treatment" might provide a ready excuse for needlessly incarcerating socially undesirable individuals, might well be minimized by the least intrusive approach. 422 U.S. at 589. And the issue addressed in *Addington*, that "the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others," 441 U.S. at 426, which the court found to be inadequately served by use of a weak "preponderance" standard in commitment proceedings, might well be furthered by employment of the least intrusive standard.

[56] It would not appear that the Supreme Court's summary dismissal for want of a substantial federal question in *Sanchez v. New Mexico*, 396 U.S. 276 (1970), dismissing appeal from State v. Sanchez, 800 N.M. 438, 457 P.2d 370 (1969), which held that an admittedly dangerous patient did not have a right to the least restrictive environment, forecloses inquiry into the matter here. Recent Supreme Court decisions have indicated that summary dispositions are not ironclad rulings, and that their precedential force may well be modulated by subsequent doctrinal developments. *See Illinois State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Washington v. Yakima Indian Nation*, 439 U.S.

for the plaintiff to prevail it is necessary to find that an individual involuntarily confined in a facility for the mentally retarded did not receive a form of treatment that is regarded as acceptable for him in light of present medical or other scientific knowledge.[37] The state should be permitted to adduce evidence of security concerns, administrative necessities and fiscal constraints in the course of explaining its adoption of the challenged program. Thus, if defendants can demonstrate a coherent relationship be-

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463 (1973); *Mandel v. Bradley*, 432 U.S. 173 (1977). There have been substantial doctrinal developments since *Sanchez* in the mental health field, ranging from the Court's *O'Connor* decision to the decisions of circuit and district courts recognizing some sort of right to treatment in the least restrictive setting. And in the interim, Congress has also determined that treatment in the least restrictive setting is appropriate to effectuate and protect the rights of the mentally retarded. *See* 42 U.S.C. §§6001-6081 (1976) (Developmentally Disabled Assistance and Bill of Rights Act). Moreover, our declination to recognize an across-the-board constitutional right to treatment in the least restrictive alternative precludes a square conflict with *Sanchez*.

[37] The court's role, in this respect, is somewhat similar to its function when reviewing action by administrative agencies. The standard of review articulated over a decade ago in *Tribby v. Cameron*, 379 F.2d 104 (D.C. Cir. 1967), remains valid today: the hospital need not necessarily make the best decision, just a permissible and reasonable one. Intelligent judicial review must rely on a well-reasoned analysis by the institution and a record of its treatment decisions. *Covington v. Harris*, 419 F.2d 617, 626 (D.C. Cir. 1969). Moreover, we recognize that this creates only a narrow judicial guarantee that those confined for treatment and who both seek and require it will receive it. The courts have not, as yet, begun to address whether there is a duty of all involuntarily confined residents to submit to some treatment.

tween a particular treatment program and a resident's needs, they would not be liable.[58]

The standard articulated here may appear, at first blush, to differ minimally from that propounded by the concurrence. However, the concurring opinion's concern with distinguishing the constitutional prohibition against a "substantial departure from accepted professional judgment" from a malpractice standard might lead to an approval of all conduct that is "not a sham or otherwise illegitimate." *Infra* at 66a. We do not believe that such a test can adequately protect a retarded person's acknowledged constitutional right to treatment or habilitation.[59] Nor does the judiciary lack the tools to ascertain whether

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[58] One effective means of resolving complaints regarding treatment programs would be for the institution to provide an internal grievance mechanism with appropriate procedural safeguards. This is not to suggest, however, that a full trial-type proceeding be employed. The adversary character of a full legal hearing is often not suited to the medical determinations at issue in treatment decisions. As the Supreme Court stated in *Parham v. J.R.*, "due process is not violated by use of informal, traditional medical investigative techniques." *Id.* 442 U.S. at 607. Adversary proceedings might well be counterproductive to the establishment of a therapeutic alliance between physician and patient. And the state interest in avoiding disruption and unnecessary intrusion into medical judgments, as well as the patient's interest in impartial diagnosis, may best be served by providing for independent decisionmakers from within the institution. *See Vitek v. Jones*, 48 U.S.L.W. 4317, 4321 (March 25, 1980).

[59] Admittedly, the intent element of "deliberate indifference" is absent, but that aside, the standard propounded by the concurrence guarantees little more than the Eighth Amendment's proscription of callous indifference to the serious medical needs of prisoners.

the constitutional minimum of medical acceptability proposed here is being fulfilled. While earlier courts struggled to weigh conflicting opinions and contending medical theories regarding severely retarded persons, Congress has recently facilitated a court's ability to determine whether a coherent relationship between a treatment program and a resident's needs exists. The enactment of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 provides guidelines, albeit not constitutionally binding, which enhance rational court review.

Should the plaintiff's constitutional claims fail, the recent case of *State of Maine, et al. v. Thiboutot*, 48 U.S.L.W. 4895, 4860 (June 24, 1980), may provide a remedy under 42 U.S.C. §1983 for statutory claims grounded in the Developmentally Disabled Assistance and Bill of Rights Act. The potential availability of such a route for redressing infringements or deprivations of rights established by federal statutes further suggests that we are dealing not with matters of common law malpractice, but with fundamental interests of national import.

VII.

Although the varying standards set forth in this opinion may occasion concern that the issues presented to the jury might appear overly complex, we believe they are meaningful and carefully distinguish varying factual situations. It cannot be gainsaid that the act of shackling a resident is substantially different from the implementation of daily treatment decisions. Likewise, a failure to protect an individual from a sustained series of attacks cannot properly be equated with a failure to choose a particular technique for habilitation. Accordingly, special effort should be employed to ensure that juries can intelligently

grasp the differences. Such an effort is not completely novel in the law. It takes place, for example, in areas of negligence law, immunity law, and admiralty law. We do not, therefore, share the concern expressed by the concurring opinion that district court judges or juries will be unable to understand these distinctions. Moreover, it is reasonable to expect that future plaintiffs will have grounds for raising only one or two of the claims analyzed here, thus further simplifying the difficult task. In any event, it would be a disservice to an injured person who claims to have been abused during a period of involuntary institutionalization to lump indiscriminately a variety of constitutional violations for the sake of beguiling simplicity. Such oversimplification, so handy in political debate, often lacks the precision necessary for resolving complicated legal questions.

Inasmuch as it is still unclear how the evidence will emerge at the retrial, we have set forth in an appendix what may provide a beginning point for a set of jury instructions in a matter of this type.[60] Of course the specific instructions submitted to the jury must be carefully structured to reflect the actual record that is developed on remand.

VIII.

Because we have already ruled that a new trial is required, we need not decide whether the other errors raised by plaintiff concerning the method in which the trial was

[60] There has been no suggestion or argument made in this case regarding the possibility of different standards for the compensatory and punitive damages claims. While it may be desirable to differentiate such charges and to require explicitly a knowledge or state of mind element in punitive claims, the development of such distinctions must await a more fully adumbrated record.

conducted are themselves grounds for a new trial. However, we believe that a comment on the trial court's approval of dual representation for the defendants is in order. At a final pretrial conference, the attorney who had appeared for all the defendants, as a result of an insurance agreement, requested that both he and the deputy attorney general, who represented the defendants as state employees, be permitted to act as counsel during trial. The district court ruled in favor of this joint participation. In order to explain the presence of both attorneys, the court suggested that insurance counsel identify himself as the attorney for Dr. Youngberg, and that the deputy attorney general identify himself as counsel for defendants Matthew and Conley. The jury was so advised, and heard two sets of opening and closing statements, as well as double cross-examinations, although no separate legal interests or conflicts among defendants were asserted or surfaced.

On remand, the district court should make some ruling on this issue. If it determines that dual representation is permissible, it should set forth supporting reasons.[61] Moreover, the practice of permitting counsel to make deliberate misstatements to the jury, even for the purpose of concealing the existence of liability insurance coverage, is of dubious propriety and should not be repeated.

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[61] This written response to any objections of the plaintiff may well include consideration of relevant local rules limiting the number of attorneys who may participate, *e.g.*, E.D. Pa. Local R. 33 (a), especially where, as here, representation is joint rather than several. Because the complaint sought money damages from the defendants in their individual, not official, capacity, the Attorney General's duty or option to defend lawsuits against state emloyees may be no different in such an instance from that of an insurance carrier under a contract.

IX.

In order to appreciate the full problem posed by this case, it is important to note that the Supreme Court has recognized a common law of qualified immunity protecting officials and employees from civil liability for acts performed in the discharge of duties imposed upon them. Such immunity is available even when constitutional rights have been transgressed, if the official or employee was not aware, or had no reason to be aware, of such rights. As the Supreme Court explained in *Wood v. Strickland*, liability for damages for every action which is found subsequently to have been violative of a person's constitutional rights and to have caused injury would unfairly impose upon administrators the burden of mistakes made in good faith in the course of exercising discretion within the scope of official duties. 420 U.S. 308 at 319 (1975).

Because of the evolving nature of the rights in issue here, it may well be that the defendants did not know of them or had no reason to know of them—governmental officials are not "charged with predicting the future course of constitutional law." *Pierson v. Ray*, 386 U.S. 547, 557 (1967). Institutional administrators are entitled to rely on traditional sources for the factual information incorporated in their policy decisions, and when faced with behavior causing or threatening disruption, have an obvious need for prompt action and judgments, which can only be based on existing knowledge. *See Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974). Accordingly, when this matter is remanded for a new trial, the trial judge should instruct the jury regarding the possibility of immunity[62] with

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[62] *See* Trial Transcript, Vol. 8, p. 21. It should be noted that in the original class action litigation alleging state and federal

the caveat that defendants' reasonable belief is to be judged at the time their actions were taken. The jury should further be charged that the defendants are not responsible for unforeseeable developments in the law.

X.

The deplorable conditions at Pennhurst and the manifold problems and anguish that those conditions spawned have been addressed in *Halderman v. Pennhurst.* The present litigation deals with the more discrete problems facing individual patients and their relationships with officials and employees of the institution. More particularly, it relates to the constitutional rights possessed by such citizens and the responsibilities and duties of officials and employees who are claimed to violate such rights.

Unfortunately, these constitutional rights have not always been clearly perceived, and even when recognized the description of such rights, their articulation, and their application to particular factual patterns has only slowly emerged. Even today, the process is still in its early stages.

The difficulty of the task—and it frequently is difficult to describe with exactitude the contours of developing constitutional protections—is further complicated because the applicable medical disciplines are themselves still

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statutory as well as Constitutional violations and involving an admittedly different set of Pennhurst officials and plaintiffs, the district court found that "the defendants have met their burden of convincing us by a preponderance of the evidence that they are entitled to the good faith immunity from damages afforded to such officials in connection with the injuries suffered by the named plaintiffs." *Halderman v. Pennhurst State School and Hospital,* 446 F.Supp. 1295, 1324 (E.D. Pa. 1977) *aff'd and modified,* 612 F.2d 84 (3d Cir. 1979).

in their formative period, and because the resources available to the states are so limited. Nonetheless, where valid rights of citizens are at stake, the courts may not shirk the task of seeking to spell out the elements and details of such rights as carefully as possible.

To the extent that in the past we may have invoked inapplicable analogies, we should be forthright enough to admit the error and to seek to rectify it. To the extent that utilization of other concepts, though appealing, is found to be impractical, we should continue the quest for standards that are realistic and reflective of the changes that are still taking place in psychiatry, psychology, sociology and other related fields that so greatly affect the problems of the retarded.

And we should be cautious in establishing rules that would visit serious financial liabilities on administrators, who, when they performed the acts in question, were not aware of the new standards of rights and responsibilities subsequently formulated by the courts or the new scientific advances that have been achieved to minister to persons who are mentally retarded.

XI.

The judgment of the district court will be vacated, and the case remanded for a new trial.

APPENDIX

I. SHACKLING

If you find that the plaintiff was shackled against his will, and defendants knew or had reason to know of such conduct, you may find the defendants liable unless they can offer compelling reasons for this action. If the defendants satisfactorily explain that it was necessary to shackle the plaintiff for his own protection or for treatment purposes, then they may not be liable. However, it must be demonstrated that the shackling was the least restrictive means of handling the resident — that other, less severe measures had been tried or considered and found unworkable. Only compelling reasons relating to the treatment or the protection of the resident are permissible justifications for shackling.

II. PROTECTION FROM ATTACKS

If you find that the plaintiff was harmed by a series of attacks, and the defendants knew or had reason to know of them, then you may hold the defendants liable. If the defendants knew or had reason to know of these attacks, then only if they provide substantial reasons which explain that the attacks occurred despite their attention will they be deemed to have fulfilled their duty to care for and to protect the plaintiff. Substantial explanations have to do with promoting the treatment or protection of the plaintiff. For example, if the staff considered it important, for therapeutic purposes, to have the resident mingling with others instead of confined to an isolated cell, even though some risk of injury existed, you may consider that to be a substantial explanation. But overcrowded conditions or inadequate staffing patterns may not justify the injuries.

III. ADEQUATE TREATMENT

A. If you find that the plaintiff was involuntarily committed for treatment, and no treatment was administered, and no compelling explanation for the lack of treatment was offered, you may hold the defendants liable.

B. If you find that the plaintiff has received some treatment, you must then determine whether the treatment is regarded as acceptable in the light of present medical or other scientific knowledge. If you find that it is not acceptable, you may find for the plaintiff. In addition, if the evidence does not demonstrate that there is a relationship between the treatment administered and the plaintiff's needs, even if the treatment is arguably regarded as acceptable in other situations, then you may find for the plaintiff. In deciding upon the adequacy of the treatment program adopted you may consider the defendants' explanations regarding security concerns, administrative necessities and fiscal constraints.

C. If you find that a selection of a mode of treatment subjected the plaintiff to significant deprivations of liberty, then you must go on and determine whether that decision provided for the least intrusive treatment available under the circumstances. If the defendants considered other alternatives and ascertained that the program adopted was the least intrusive available, then you should find the defendants not liable.

SEITZ, *Chief Judge*, concurring, with whom Judges Aldisert, Rosenn, and Garth join.

I agree with the majority that the judgment of the district court must be vacated and the case remanded for a new trial because of the exclusion of relevant expert testimony and the use of improper legal standards in the charge to the jury. I also agree with the majority that this case is governed by the due process clause of the fourteenth amendment and not by the eighth amendment. I write separately because of a pervasive disagreement with the majority with regard to the standards that should be employed in charging the jury on remand.[1]

I.

Pennhurst is not unfamiliar to this court. *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84 (3d Cir. 1979) (in banc), *cert. granted*, 100 S. Ct. 2984 (1980), was a class action on behalf of the residents of Pennhurst challenging the practice of institutionalizing the mentally retarded. Plaintiff Nicholas Romeo is a member of that class, and the defendants here are also defendants in *Halderman*. A majority of this court held in *Halderman* that federal and state statutory provisions granted the residents of Pennhurst a right to treatment in the least re-

[1] The existence of a qualified immunity defense is not raised on this appeal. Consequently, I will not address this question even though it is discussed in the majority opinion.

I also emphasize that, as the majority appears to concede, this appeal does not present claims involving nonreversible surgery or the administration of antipsychotic drugs. Therefore, in my view the majority opinion would not be controlling if such claims were asserted in other litigation.

strictive environment. *See* 612 F.2d at 104-07; Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6001-6081 (1976); Mental Health & Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50, §§4101-4704 (Purdon 1969). The court remanded for an individualized determination of what type of environment, institutional or otherwise, best suited each class member's needs. The majority did not have to reach the constitutional issues presented by the plaintiffs.

This suit presents legal issues that take the next step beyond *Halderman*. The plaintiff alleges that while confined at Pennhurst he was deprived of his rights under the eighth and fourteenth amendments of the Constitution.[2] The defendants are state officials who had policymaking and supervisory responsibilities at Pennhurst when the alleged constitutional violations occurred. They are charged by the plaintiff with failing to adopt policies and procedures that would protect the plaintiff from attacks by other residents and staff. The plaintiff also claims that the defendants violated his constitutional rights after his transfer to the Pennhurst hospital building by causing him to be physically restrained for long periods of time and by refusing to provide adequate treatment. The violations after the plaintiff's transfer to the hospital building were allegedly to punish him for filing this suit. Although the theory of the plaintiff's complaint is not entirely clear, the defendants are apparently charged with direct liability

[2] The procedures used to commit the plaintiff are not at issue here. *See generally Secretary of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979). Nor is it significant that the plaintiff's mother, and not the state, applied for his commitment. *See Halderman*, 612 F.2d at 94. Accordingly, those factors have no bearing on the analysis that follows.

rather than vicarious liability for the conduct of other state employees supervised by them. The plaintiff's complaint requested injunctive relief as well as damages against the defendants in their official and individual capacities, but only the damage claims against the defendants in their individual capacities are raised on this appeal.

II.

The majority establishes a multilevel series of standards to govern the plaintiff's claims. First, with respect to the protection claim, the majority holds that failure of the defendants to provide for the plaintiff's safety can be justified only by a showing of substantial necessity. Second, because physical restraint "raises a presumption of a punitive sanction," it can be justified only by a compelling necessity. In addition, the majority holds that the plaintiff is entitled to an instruction that the defendants must show that restraint was the "least restrictive method of dealing with the patient, in light of his problems and the surrounding environment." Third, the majority divides the treatment claim into three categories. If the jury finds that no treatment was administered, it may hold the defendants liable unless they can provide a compelling explanation for the lack of treatment. If some treatment was administered, the defendants will not be liable if that treatment was "acceptable in light of present medical or other scientific knowledge. . . . Thus, if defendants can demonstrate a coherent relationship between a particular treatment program and a resident's needs, they would not be liable." Finally, "least intrusive" analysis applies to the selection of a treatment approach if the jury finds that the approach subjected the plaintiff to "significant deprivations of liberty."

These standards are unnecessarily complex, and they undoubtedly will cause confusion. This complexity and confusion will affect both the ability of a jury to meaningfully assess liability and the ability of state officials like the defendants to effectively conform their conduct to these standards. The jury will be forced to make artifical distinctions between what are in reality related issues. Moreover, the jury must give essentially similar standards the distinctive meanings envisioned by the majority. For example, even if the jury can meaningfully differentiate between compelling necessity and substantial necessity, it is unlikely that it can do so in the manner contemplated by the majority, *i.e.*, as a way "to distinguish between isolated incidents and inadvertent accidents, on the one hand, and persistent disregard of patients' needs, on the other."

The majority's multilevel standards also will inject complexity and confusion into the work of state officials who, like the defendants, have policymaking and supervisory responsibilities at institutions like Pennhurst. These officials will have to formulate policies and procedures to ensure that the institution's residents are (a) protected from attack unless some *substantial necessity* justifies the lack of protection, (b) left unrestrained unless some *compelling necessity* justifies their restraint, and (c) treated with various methods that may, depending on the circumstances, have to be based on *accepted medical or other scientific knowledge* or be the *least intrusive treatment available.*

Furthermore, in the unlikely event that state officials are able to formulate appropriate policies and procedures under the different standards, they still may be uncertain as to what standards govern their conduct. Treatment programs, for example, could be governed by more than

one standard. Testimony at the trial indicated that some behavior modification programs utilize "timeout" principles involving periodic mechancial restraint of the limbs to eliminate aggressive behavior. It is not clear whether such a program has to be the least intrusive alternative or only be acceptable in light of present medical or other scientific knowledge.

This complexity and confusion is unnecessary. In some situations the development of multilevel standards may be unavoidable. I do not believe, however, that such standards are required in this case to accurately differentiate the factual and legal issues presented. As will be noted below, the plaintiff's claims are interrelated, and it is unrealistic to treat them as discrete questions. Protection, restraint, and treatment are not severable issues in the context of the institutionalized mentally retarded. I believe that a single standard can be established to protect the constitutional rights of committed persons while recognizing the legitimate interest of the state.

III.

It is important to examine the relevant constitutional principles before formulating a standard to govern the issues presented in this case. Initially, I agree that conditions of confinement of the mentally retarded are subject to due process scrutiny. Government action that infringes liberty interests is subject to scrutiny under the due process clause and, at a minimum, it must be supported by a legitimate state interest. A mentally retarded person does not lose this protection merely because he is institutionalized.

This is not the end of the matter, however. Institutionalization by definition entails some restrictions on

the personal liberty of committed individuals. As I noted in *Halderman*, I believe that "the state's willingness to provide the residents with such necessities as food, shelter, medical care, and supervision, for which the residents have no other source, forms an adequate basis for some state-imposed restrictions on their liberty." 612 F. 2d at 125 (Seitz, C.J., dissenting). The questions that remain, of course, are the degree to which personal liberty can be infringed and the duties owed by the state to residents of its institutions.

The state may not confine a mentally retarded individual unless it has at least a legitimate purpose for doing so. Because the state can confine an individual only for certain purposes, the conditions of that confinement must bear a reasonable relationship to those purposes. As the majority notes, three state interests traditionally have been advanced to justify commitment of the mentally disabled: danger to others, danger to self, and the need for care or treatment. When analyzing these state interests it is tempting to speak of them as being analytically distinct. In reality, they represent a finely meshed interaction of state interests and patient needs. This is especially true in the context of postcommitment issues. For example, it is somewhat artificial to speak of danger to self as being distinct from the need for care or treatment. The very fact that an individual is dangerous to himself means that he needs care and treatment. Similarly, the need for a safe environment, which is raised by the plaintiff's protection claim, implicates all three interests. Some of the plaintiff's injuries are the result of retaliation by other patients for his attacks on them, and this retaliation has a double effect: it makes the plaintiff's environment physically unsafe and it tends to impede his maximum development. Although

the three interests are not entirely coextensive, this interrelation must be kept in mind when employing legitimate state interest analysis.

With this view of state interests and patient needs in mind. I believe that the plaintiff has a constitutional right to minimally adequate care and treatment. The existence of a constitutional right to care and treatment is no longer a novel legal proposition. *See, e.g., Donaldson v. O'Connor,* 493 F.2d 507 (5th Cir. 1974), *rev'd on other grounds and remanded,* 422 U.S. 563 (1975); *Rouse v. Cameron,* 373 F.2d 451 (D.C. Cir. 1966). Although the seminal right-to-treatment cases were concerned only with the mentally ill, recent cases have extended this right to the mentally retarded. *See e.g., Welsch v. Likins,* 550 F.2d 1122 (8th Cir. 1977); *Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974).

It is important to remember, however, that insofar as a constitutional right to treatment is concerned, there are critical differences between the mentally ill and the mentally retarded. *Cf. Kremens v. Bartley,* 431 U.S. 119, 135-36 (1977) (in defining appropriate class in rule 23 action challenging state commitment statute, court must pay careful attention to differences between mentally ill and mentally retarded. For example, this court noted in *Halderman* that "[s]trictly speaking, since mental retardation is not a curable disability, the term 'treatment' is inappropriate. Rather, 'habilitation,' which refers to 'that education, training and care required by retarded individuals to reach their maximum development' . . . is the more appropriate term." 612 F.2d at 95 n.14 (citation omitted). It is in this sense that I use the term "treatment" in this opinion. In addition, profoundly retarded persons such as the plaintiff are generally unable to provide them-

selves with food, shelter, and clothing as well as basic protection from other persons and physical hazards. Thus, the danger rationales justifying commitment of the mentally retarded are often quite different from those justifying commitment of the mentally ill.

The state does not contest that it has placed the plaintiff in Pennhurst to provide basic care and treatment. Indeed, he has a right to treatment under state law, *see Halderman*, 612 F.2d at 100-103, and the fact that Pennhurst has programs and staff to treat patients is indicative of such a purpose. I believe that when the purpose for confining a mentally retarded person is to provide care and treatment, as is undoubtedly the case here, it violates the due process clause to fail to fulfill that purpose. With the above considerations in mind, I will now examine the contours of the constitutional right to care and treatment in the context of each of the plaintiff's claims.

IV.

A. Protection Claim

The plaintiff's first claim is that the defendants violated his constitutional rights by not adopting policies and procedures that would protect him from attacks by other residents and Pennhurst employees. In its charge to the jury on this issue, the district court stated that the defendants could be held liable only if they were "deliberately indifferent to the medical and psychological needs of [the plaintiff]." The plaintiff argues that the district court erred in using this language. The phrase "deliberate indifference" derives from *Estelle v. Gamble*, 429 U.S. 97 (1976), in which the Supreme Court held that deliberate indifference to the serious medical needs of prisoners "constitutes the 'unnecessary and wanton infliction of pain'

proscribed by the Eighth Amendment." *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.)). The question presented here is whether this eighth amendment standard is a correct statement of the duty imposed by the due process clause to care for and to treat the institutionalized mentally retarded.

The constitutional right to care and treatment means that the defendants must provide a "basically safe and humane living environment." *Goodman v. Parwatikar*, 570 F.2d 801, 804 (8th Cir. 1978). This duty includes reasonable protection from attacks by other residents and staff. At a minimum, the defendants have an affirmative obligation to discover the needs of mentally retarded patients for protection and to respond to those needs in an adequate manner. Because the deliberate indifference standard is not proper method to implement these affirmative due process requirements, use of such language in the charge was reversible error.

The plaintiff contends that the correct legal standard is that the defendants must take reasonable steps to protect the plaintiff. This standard, however, is virtually indistinguishable from the standard that would apply in a state malpractice action. Some courts have analogized to common-law tort principles in adopting the standard of care for a section 1983 claim. *See, e.g., Whirl v. Kern*, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969). However, the Supreme Court has exhibited concern in an eighth amendment context about turning every state malpractice claim into a constitutional violation. *See Estelle*, 429 U.S. at 106 ("deliberate indifference" standard used to distinguish constitutional violations from medical malpractice). Constitutionalization of state torts is equally

a concern in due process analysis. *See, e.g., Paul v. Davis,* 424 U.S. 693 (1976); *United States v. Delerme,* 457 F.2d 156 (3d Cir. 1972). Adoption of the standard requested by the plaintiff would make section 1983 coextensive with malpractice claims when state action is present.

Distinguishing constitutional violations from ordinary malpractice claims is especially difficult in the present case because care and treatment often involve issues similar to those presented by malpractice actions. Nevertheless, I believe that this distinction should be maintained in order to confine the jury to constitutional deliberations. It is true that some malpractice claims may also rise to the level of a constitutional violation. This does not mean, however, that liability under section 1983 should be coextensive with liability in state malpractice actions. The fourteenth amendment was not intended to remedy every tort violation in which there is state involvement. Section 1983 itself places limitations on the constitutionalization of state tort claims by requiring that plaintiffs be deprived, under color of state law, of a right secured by the Constitution and laws of the United States. Strict adherence to these requirements prevents section 1983 from becoming a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis,* 424 U.S. at 701.

Because federalism principles are implicated here, I believe that a further limitation is necessary. Under these circumstances I would hold that allegations of constitutional violations based only upon mere malpractice do not state a cause of action under section 1983. *See Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077, 1081 (3d Cir. 1976) (neglect, carelessness, or malpractice without more does not establish constitutional violation under

§1983); *Harper v. Cserr*, 544 F.2d 1121, 1124 (1st Cir. 1976) (section 1983 would not afford relief for complaint alleging negligence or malpractice). This construction of the statute implements the objectives of section 1983 without encroaching on interests that are only a matter of state concern. It must be remembered that with respect to the institutionalization of the developmentally disabled, the Constitution only establishes minimum standards below which the state's conduct may not fall. Although common-law tort principles may provide a useful starting point in formulating the appropriate standard of care under section 1983, they cannot be determinative of the constitutional issue.

In developing a standard to assess whether the defendants have infringed the plaintiff's constitutional right to care and treatment, it is also important to keep in mind the nature of the conduct that will be evaluated by the jury. The question of how best to treat the mentally retarded is a hotly debated subject among experts, and the answers most likely will change over time with the acquisition of new knowledge. Although the statutes in *Halderman* required us to enter the debate, I believe that such a debate should not be elevated to constitutional proportions. A statute is relatively easy to change but the Constitution is not. In my view, the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made. *Cf. Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1342-44 (1974) (discussing use of an administrative law model to ensure that court does not engage in evaluating various psychiatric theories).

Although I have indicated that the care and treatment of the institutionalized mentally retarded must be left largely to the appropriate professionals, some judicial scrutiny is essential if the right to care and treatment is not to become meaningless. As I noted previously, the defendants must discover the needs of the institution's residents and, if action is necessary, respond adequately to those needs. Once the defendants have taken action, or have chosen not to act, it must be determined whether their conduct satisfies the Constitution.

I would hold that the jury should be instructed that the defendants are liable if their conduct was such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment. This is not a malpractice standard. By "accepted professional judgment" I do not mean some standard employed by a reasonable expert or a majority of experts in the community, as state malpractice actions would require, but rather that the choice in question was not a sham or otherwise illegitimate. The jury is to decide only whether the defendants' conduct had some basis in accepted professional opinion. Furthermore, unlike state malpractice actions, a departure from accepted professional judgment must be substantial to give rise to liability. Although violations of the standard that I have developed would probably contravene state malpractice standards as well, this does not mean that the two standards are coextensive. The "substantial departure from accepted professional judgment" standard effectively distinguishes between conduct that violates the minimum requirements of the Constitution and conduct, such as ordinary malpractice, that does not.

Instructions consistent with the previous paragraph properly balance the plaintiff's constitutional right to minimally adequate care and treatment against the legitimate interests of the state. Thus, with regard to the plaintiff's claim that the defendants failed to adopt policies and procedures that would adequately protect him from attacks by other residents and staff, the jury should be charged in accordance with the "substantial departure from accepted professional judgment" standard. The district court's charge is inconsistent with this standard, and it improperly excluded expert testimony relevant to the above inquiry.

B. *Restraint Claim*

In his second claim, the plaintiff alleges that the defendants violated his constitutional rights by causing his freedom of movement to be restricted through the use of various mechanical restraints while he was confined in the Pennhurst hospital building.[3] The majority holds that the least restrictive alternative standard applies to this claim. I believe that this standard does not represent what the Constitution requires as a minimum for a number of reasons. In *Halderman* this court held that the residents of

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[3] Testimony at the trial demonstrated that the plaintiff was restrained in three different ways. When restraints were used the plaintiff was generally in "soft restraints." These restraints allow limited freedom of movement and confine a resident to the same area by securing his arms or legs to a chair or bed. Sometimes metal shackles were used on the plaintiff. This type of restraint consists of a metal wrist or leg band to which a leather belt is attached. The leather belt is tied to a chair or bed to restrict the resident to that particular area. Finally, the plaintiff was occasionally restrained by a leather muff around his hands. *See* Trial Transcript, vol. 4, at 170-71; vol. 7, at 50-56.

Pennhurst have a right to treatment in the least restrictive environment under the Developmentally Disabled Assistance and Bill of Rights Act and the Pennsylvania Mental Health & Mental Retardation Act of 1966. However, *Halderman* rested solely on statutory grounds and the present case involves the Constitution.[4] Furthermore, the least restrictive alternative standard is inappropriate here for a far more fundamental reason.

The major issue in *Halderman* was whether institutionalization was per se illegal. Although we referred to the living conditions at Pennhurst, the main issue in *Halderman* was *where* the members of the class should be treated. That question is not presented in this case. *See* note 2 *supra*. The only question here is whether, assuming institutionalization is legal, the actions taken within the institution satisfy the Constitution. Regardless of the validity

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[4] The holding in *Halderman* that the Developmentally Disabled Assistance and Bill of Rights Act was enacted under §5 of the 14th amendment does not mean that the legal standard of that statute—the patients have a right to treatment in the least restrictive environment—controls the disposition of the constitutional issues here. *See Halderman*, 612 F.2d at 98. In *Halderman* we held only that the statute was a permissible exercise of Congress' §5 enforcement power. The distinction between §5 and §1 of the 14th amendment is crucial because Congress may proscribe conduct that a court would not find unconstitutional. Indeed, the test under §5 is that normally associated with the necessary and proper clause. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966). Thus the court's holding in *Halderman*, which relied on *Katzenbach v. Morgan* (see 612 F.2d at 98 & n.18), merely means that the standard in the Developmentally Disabled Assistance and Bill of Rights Act is permissible under the necessary and proper clause. The test normally associated with the necessary and proper clause, however, is not an appropriate method of analyzing what due process requires as a minimum.

of least restrictive alternative analysis in other facets of treatment of the mentally retarded, it simply has no applicability to conditions within an institution.

Implicit in the least restrictive alternative theory is the notion that the state's only interest in institutionalizing a person is treatment. *See, e.g., Wyatt v. Aderholt,* 503 F.2d 1305, 1313 (5th Cir. 1974) (state interests other than treatment are "trivial" compared to massive curtailment of liberty involved). *But see Morales v. Turman,* 562 F.2d 993, 998 (5th Cir.) (questioning this and other aspects of *Wyatt*), *rev'd and remanded on other grounds,* 430 U.S. 322 (1977) (per curiam). I believe, however, that this gives inadequate recognition to the subtle interrelation of the various state interests involved.

As already noted, the three state interests normally associated with confinement of the developmentally disabled—danger to others, danger to self, and need for care or treatment—overlap and mesh together to some extent in this context. This is especially true as to actions taken within the institution, where decisions about proper care or treatment often must be made on a day-to-day basis. The least restrictive alternative test gives inadequate recognition to this fact. Because the state's interests are rather complex, a particular mode of care or treatment may serve one state interest but not another. For example, physical restraints may serve short-run safety needs but not long-run habilitation needs. By focusing on the "best" care or treatment through a rather rigid view of the state interests, least restrictive alternative analysis tends to obscure the true nature of the state interests. Because the standard to be applied must give recognition to the interplay of the various interests, I believe the majority's test is an inap-

propriate standard for constitutional purposes. In short, even if least restrictive alternative analysis provides an appropriate framework for answering the question of where to place the mentally retarded, it is simply too rigid a tool once we leave that question and focus on conditions of care and habilitation within a particular institution.

Moreover, the least restrictive alternative standard is not easily transferable from the context in which it originated to the situation presented by this case. The standard evolved from the less drastic means analysis formulated by the Supreme Court in cases involving free speech. *See, e.g., Shelton v. Tucker,* 364 U.S. 479 (1960). Since its first exposition of the less drastic means doctrine, the Supreme Court has been rather cautious in using the doctrine because some less drastic alternative almost always exists. If used without caution, the doctrine could invalidate almost any state action. *See generally Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring); Note, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 464, 472 (1969).

These difficulties can be avoided where there is one, objectively ascertainable less drastic means. *See* Richardson, *Freedom of Expression and the Function of Courts,* 65 Harv. L. Rev. 1, 40 (1951). This single, objective alternative simply does not exist in the care and treatment of the mentally retarded because what is the best care or treatment at any given time may be a subject of great professional debate. Thus, judges and juries likely will not be able to make a single, objective determination. Furthermore, because a mentally retarded individual's needs change over time, the least restrictive alternative standard

will in effect require continuing evaluation of the "best" method, not a single determination. Although Congress or the states may adopt this standard as part of a statutory scheme, such difficulties caution against use of the doctrine as a constitutional matter. Thus I disagree with the majority's application of the least restrictive alternative standard to the plaintiff's restraint claim.

The "substantial departure from accepted professional judgment" standard that I developed in relation to the protection claim should also apply to the restraint claim. This standard provides for judicial scrutiny yet gives the state leeway in which to accommodate the interests it has in confining the mentally retarded. At first glance, this standard may appear to be inappropriate in the context of a restraint claim. As I noted earlier, however, the state's interests are interrelated, and it is unrealistic to view each of the plaintiff's claims as separate and distinct. Mechanical restraints, when used properly in accord with preestablished procedures, can be an integral part of a treatment program.[5] Furthermore, restraints may

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[5] Pennsylvania law establishes one such procedure by requiring that mechanical restraints be used within an institution only when "the director of a facility or his designee determine that [restraints] are required by the medical needs of [a] person admitted or committed." Pa. Stat. Ann. tit. 50, §4422 (Purdon 1969). Testimony at the trial showed that the plaintiff was restrained only on the order of a licensed physician. The majority, however, appears to assume that the defendants did not comply with §4422 because the physician's order was not supplemented by an order of the director of Pennhurst. *See* majority op. at nn.21 & 25. But it is not clear to me that physicians employed at Pennhurst cannot be the director's "designee" within the meaning of the statute. Moreover, this issue is not raised on appeal and was not briefed by the parties.

be essential to protect the safety of the patients.[6] Whether this is the situation here is, of course, a question for the jury.

I believe that the jury should be instructed that physical restraint related to the provision of care or treatment violates the plaintiff's rights if the defendants' conduct was such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the defendants did not base their conduct on a professional judgment. Restraint for the convenience of the staff or for punishment serving no legitimate purpose would be a substantial departure from accepted professional judgment and thus a violation of the plaintiff's constitutional right to care and treatment. Of course, other prerequisites to establishing the defendants' liability also would have to be met.

C. *Treatment Claim*

The plaintiff's final claim is that the defendants deprived him of his constitutional rights by not making available adequate treatment while he was confined in the Pennhurst hospital building. The plaintiff also appears to be asserting that he has a right to treatment in the least restrictive alternative. My discussion of the least restric-

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[6] Protection may include both protection from self and protection from others. Confinement in a hospital may present special problems because of the presence of medical equipment and supplies and the fragile health of many patients. For example, testimony at the trial indicated that profoundly retarded residents often need to be restrained when confined in the Pennhurst hospital building because other patients are in traction or receiving intravenous fluids. *See* Trial Transcript, vol. 7, at 40-41, 76.

tive alternative standard in the preceding section applies with equal force to the treatment claim. As a result, I agree with the majority's holding that least restrictive alternative analysis is inappropriate when assessing the adequacy of treatment already administered. I do not agree, however, that the standard articulated by the majority is a correct statement of what the Constitution requires, nor do I concur in the majority's promulgation of a three-tier framework for analyzing treatment claims.

The majority holds that when the jury finds that some treatment has been administered, it should determine whether the treatment is regarded as acceptable in light of present medical or other scientific knowledge. This standard is in effect the same standard that would apply in a state malpractice action. As noted previously, it is of vital importance to maintain the distinction between common-law tort actions and constitutional decisions. The "substantial departure from accepted professional judgment" standard preserves this distinction while accommodating the concerns of both the institutionalized mentally retarded and state officials.

The majority also divides treatment claims into three categories and formulates different standards of review for each category. I believe, however, that such distinctions are artificial and will lead to unnecessary complexity and confusion. *See* part II *supra.* The jury should be instructed to apply the "substantial departure from accepted professional judgment" standard to all aspects of the treatment claim. Inaction by the defendants or the use of restrictive procedures in treatment can, of course, be taken into consideration by the jury in determining whether professional judgment has been exercised.

V.

The lamentable conditions that exist at Pennhurst have been detailed elsewhere. *See Halderman*, 612 F.2d 84. The institution is unsanitary and understaffed, and many of its residents are subjected to violence and enforced inactivity. I stand second to no one in condemning these conditions, and, as I emphasized in my dissent in *Halderman*, I believe that the federal judiciary has a duty to ensure that these conditions are eliminated. However, our duty in this case is only to establish minimum constitutional standards to govern the individual claims of a Pennhurst resident against certain Pennhurst officials. I would hold that the Constitution requires the district court to instruct the jury that the defendants' conduct comports with due process if it is not a substantial departure from accepted professional judgment. Because the majority's decision is inconsistent with this standard, I cannot join the opinion of the court.

ALDISERT, *Circuit Judge*, with whom Judge Garth joins, concurring.

Although I join the concurring opinion of Chief Judge Seitz in all respects, I write separately to emphasize the two important differences, one conceptual and one pragmatic, that divide this court.

I.

The concurring judges approach this troublesome problem in the grand tradition of the common law, precisely distinguishing between the elements of a due process deprivation and the elements of the state tort of medical malpractice. Chief Judge Seitz emphasizes with elegance and profound jurisprudential integrity that not all state

law torts amount to due process deprivations. He contends that in the factual complex presented here, a prima facie case of a due process deprivation is established only by proof of "such a substantial departure from accepted professional judgment, practice, or standards . . . as to demonstrate that the defendants did not base their conduct on a professional judgment," or, in other words, that the treatment technique employed was "a sham or otherwise illegitimate." Con. op. of Seitz, C.J., at page 59a.

In the common law tradition, courts resolve disputes by examining the rules laid down by prior decisions. These are rules of law in the narrow sense, "precepts attaching a definite detailed legal consequence to a definite, detailed state of facts,"[1] or "fairly concrete guides for decision geared to narrow categories of behavior and prescribing narrow patterns of conduct."[2] The common law "creeps from point to point, testing each step"[3] and grows slowly by gradual accretion from the resolution of specific problems. Holmes noted that the great growth of the common law came about incrementally.[4] Courts fashion *principles* from a number of *rules* of decision, in a process characterized by experimentation. Rules of case law are treated not as final truths, "but as working hypotheses, continually rested in those great laboratories of the law, the courts of justice."[5] The common law tradition has

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[1] *Pound, Hierarchy of Sources and Forms in Different Systems of Law,* 7 Tulane L. Rev. 475, 482 (1933).

[2] Hughes, *Rules, Policy and Decision Making,* 77 Yale L. J. 411, 419 (1968).

[3] A. Whitehead, Adventures of Ideas ch. 2, §6 (1967).

[4] Holmes, *The Path of the Law,* 10 Harv. L. Rev. 457, 468 (1897).

[5] M. Smith, Jurisprudence 21 (1909).

been described as a method "of reaching what instinctively seem the right result in a series of cases, and only later (if at all) enunciating the principle that explains the pattern—a sort of connect-the-dots exercise."[6]

Chief Judge Seitz adheres to this tradition in two respects. First, he sets forth a detailed legal consequence for the detailed set of facts in this case. By contrast, the majority's formulation is cast in terms of *grandi astrazioni*, predicating liability on notions of "substantial necessity," "compelling necessity," and "least intrusive means." These abstractions, dubbed in classroom jargon as constitutional law "buzz words," have the unfortunate capacity to mean all things to all people.

Second, Chief Judge Seitz develops the law incrementally, explaining how a respectable body of state tort law, built on thousands of fact situations resolved by courts over several centuries, is immediately available to the plaintiffs. If the plaintiffs prove egregious conduct constituting gross negligence and demonstrate that the treatment or lack of treatment may be fairly characterized as a sham, the plaintiffs would have available additional relief to cure the constitutional deprivation. Thus, he recognizes that the plaintiffs carry separate arrows in their quiver: state malpractice relief for certain levels of conduct falling below standards of reasonable medical practice, and federal relief under 42 U.S.C. §1983 if the con-

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[6] Ely, *The Supreme Court 1977 Term, Forward: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5, 32 (1978) (citing Amsterdam, *Perspectives of the Fourth Amendment*, 58 Minn. L. Rev. 349, 351-52 (1974)). *See also* Arnold, *Professor Hart's Theology*, 73 Harv. L. Rev. 1298, 1311-12 (1960); Holmes, *Codes and the Arrangement of the Law*, 44 Harv. L. Rev. 725, 725 (1931).

duct is sufficiently egregious to violate the fourteenth amendment.

By approaching the case from the common law perspective, Chief Judge Seitz recognizes a tenet recently articulated by one of America's great law schools, to which I subscribe completely:

> The United States, more than any other country, has been a country of law, laws, and lawyers; nowhere else is so much of the ferment of society expressed in terms of a Constitution. . . . We have come, however, to see that all the great issues of the day are not concentrated on constitutional law . . . but that contemporary problems embrace and are informed by a variety of public law fields, from tax and administrative law to health, labor and penal law. We have come to see, also that the traditional private law subjects—contracts, torts, and property, for instance—are more and more intertwined with considerations of public law and public interest; and further, that much of the traditional learning in these subjects is not revealed truth, but a reflection of values of society at given periods of time.[7]

Rather than creating overriding constitutional precepts that obfuscate the role of tort law in correcting institutional abuses, he relies on the Anglo-American tort law experience for a more principled resolution of this controversy.

Although the majority purport to recognize and preserve the distinction between claims under the constitu-

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[7] Curriculum Committee Report, New York University School of Law, November 30, 1978, *reprinted in* An Introduction to New York University School of Law, Juris Doctor (J.D.) Program 1980-1981 (cover page).

tion and claims under state tort law, their decision actually blurs that distinction. By formulating a standard for constitutional deprivation low enough to be asserted in virtually all malpractice actions arising out of the treatment of the institutionalized retarded, the majority place a substantial burden on lay juries, who must avoid confusing the elements of these related claims. Notwithstanding my high regard for lay jurors, I doubt that medical professionals, much less laymen, can foresee the ramifications of the majority's due process standards.

In addition, by promulgating standards for due process claims that are facially almost indistinguishable from malpractice allegations, the majority have effectively extended federal jurisdiction into all malpractice claims arising in state institutions. Although diversity is currently required to litigate state tort claims in the federal courts, future plantiffs will be able to assert, undoubtedly in good faith, that the state treatment had no "coherent relationship" to their needs, that they were restrained without "compelling necessity," or that they were left unprotected without "substantial necessity." These plaintiffs will be able to assert federal jurisdiction under 28 U.S.C. §1343 (3), and append their claim of malpractice. I do not doubt that the federal courts of this circuit will soon be repositories for all personal injury claims arising in state institutions for the mentally retarded. Indeed, that appears to be the majority's intent, for they advance the rather peculiar notion that these situations in which a person has been committed to a state institution by a state process, subject to state control through state employees, present issues not primarily of state concern, but "fundamental issues of national import." Maj. op. at page 40a This expansion of jurisdiction deserves greater consideration than just one case.

II.

The majority's abandonment of incremental decision-making in favor of promulgation of broad standards is not only methodologically offensive, but lacks utility for the groups most affected by this decision. As the preceding concurring opinion notes, the complexity and confusion of the majority's formulation "will affect both the ability of a jury to meaningfully assess liability and the ability of state officials like the defendants to effectively conform their conduct to these standards." Con. op. of Seitz, C.J., at page 51a. But the confusion will not start at the door of the jury room. In making decisions on motions for summary judgment or directed verdict, the district judges will be grasping at ropes of sand when they attempt to perceive the current wisdom of "substantial necessity" in one category of behavior or "compelling necessity" in another. And to predict what a given panel of this court will do on review would be akin to interpreting the speech of Pythia after she chewed the laurel leaves at Delphi.

But many persons besides juries, judges, and legal philosophers must participate in this divining process. There are staff physicians and, more important, staff attendants. Staff attendants, even more than physicians, are responsible for the hour-by-hour operation of state mental institutions, and their activity has now become strictly regulated by amorphous constitutional law tenets. We can assume that these attendants have neither the intellectual acumen nor the constitutional law insight possessed by Anthony Amsterdam, Gerald Gunther, Archibald Cox, or Laurence Tribe. Yet the majority formulation now requires them to apply these new constitutional precepts in deciding, for example, whether to employ "soft restraints," metal shackles, or a leather muff to control a disruptive

patient. *See* con op. of Seitz, C.J., at page 60a, n.3. As a result, staff attendants as well as staff physicians will be compelled to seek legal counsel. Their attorneys will then prophesy "what the courts will do in fact. . . ."[8] The lawyers, even specialists in medical malpractice, public or hospital administration, or casualty insurance underwriting, will be hard pressed to formulate guidelines.

One obvious situation in which guidelines will be difficult to formulate comes to mind. The plaintiff here complained of seventy separate injuries. We can assume that some were self-inflicted; some were inflicted by fellow patients, retaliating from the plaintiff's aggressive behavior. The majority formulation makes it a violation of the United States Constitution to shackle one patient improperly, and a separate violation if an unrestrained patient attacks another patient. In the real world environment of a hospital ward the staff attendant must decide which constitutional right deserves protection. The decision must be made amid the cry and tumult of a mental hospital, not in the cloister of the Third Circuit law library, nor in the conference room of nine circuit judges who are divided five to four on a difficult problem.

It took centuries for the common law to move from thirteenth century notions of criminal trespass to the landmark decisions establishing trespass on the case, now modern day negligence.[9] It took the French from July, 1790, to March, 1804, to formulate the French Civil Code,[10]

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[8] Holmes, *supra* note 4 at 461.

[9] *See* W. Prosser, Handbook of the Law of Torts ch. 2, §7 (4th ed. 1971).

[10] *See* A. von Mehren & J. Gordley, The Civil Law System 48-51 (2d ed. 1977).

and the Germans from 1873 to 1896 to fashion the *Burgerliches Gesetzbuch (BGB)*.[11] More recently, it took fifteen years of incremental development to produce strict liability for defective products.[12] Attorneys attempting to advise clients by predicting the effect of today's decision on specific fact patterns will be deprived of the body of law leading to the broad standards promulgated by the majority. Their ability to predict will suffer, and the persons most affected will be those who seek legal advice.

The majority's purpose is admirable. They recognize that the disposition of this case will presage an expansion of litigation involving the constitutional rights of the institutionalized mentally ill. In an attempt to aid the lower courts in dealing with the anticipated cases, the majority formulate general standards for evaluating these claims. But their approach does not accord with the common law adjudicatory tradition of proceeding gradually and empirically. The direction and instructions presented are thus founded not on experience, but on speculation. It is not surprising that this attempt to achieve predictability in disregard of the common law tradition achieves just the opposite result. All persons who must rely on these standards—institutional staffs, physicians, their attorneys, district judges, and subsequent panels of this court—will

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[11] *See id.* at 73-77.

[12] This development is generally measured from Roger J. Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 457, 150 P.2d 436, 440 (1947) (Traynor, J., concurring), to his majority opinion for the court in *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 687 (1962).

struggle to determine the context in which the claim arose,[13] and then to apply the appropriate standard for that context. The resulting confusion will undermine the majority's attempt to formulate universal precepts on a limited record. I predict that this court's current inexperience in this area will become increasingly apparent in subsequent cases.

The majority have failed to recognize that every new case is an experiment, and that if the accepted rule that seems applicable yields a result felt to be unjust, under the common law tradition, the rule is reconsidered. "[I]f a rule continues to work injustice, it will eventually be reformulated."[14] As Chief Judge Seitz explains, however, "[a] statute is relatively easy to change but the Constitution is not." Con. op. of Seitz, C.J., at page 58a.

It has been almost twenty years since I faced a client across a law office desk. But were I to be placed in that position today, my advice would probably go like this: if you are contemplating a position as an attendant in a mental hospital, seek another job; there is simply too much unpredictability in the law governing your conduct. If you are a physician, make certain that the state's malpractice insurance policy includes a clause protecting you from the new "constitutional torts" manufactured today

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[13] The three contexts are physical restraints, which must be justified by "compelling necessity," maj. op. at page 18a, protection from physical attacks, the absence of which must be justified by "substantial necessity," maj. op. at page 25a, and adequacy of treatment, which must be justified by "a coherent relationship between a particular treatment program and a resident's needs," maj. op. at page 38a-39a.

[14] M. Smith, note 5 *supra*, at 21.

by the Third Circuit Court of Appeals. If you are an insurance carrier, set your premiums high, anticipating fully and completely the open-ended notions of "substantial" and "compelling" necessity and "least intrusive treatment." If you are a governor or state legislator, cut back and retrench institutional programs for the mentally retarded, because the potential for lawsuits has now increased geometrically, with corresponding demands on the tax base to support the costs. If you are a parent with a retarded child, I simply feel sorry for you. The sincere effort to provide financial relief for personal injuries suffered by retarded persons has been accomplished at an enormous social cost. In striking the balance between how seriously the complainants are being hurt and how much it will cost to afford them more relief than is presently available under state tort law, the balance has been struck so vaguely that state institutional programs, already diminishing, will be curtailed further. Given the recent political currents, there simply are not, and will not be, sufficient tax dollars, state or federal, to give the defendants adequate financial protection to meet the illusory standards promulgated today.

GARTH, *Circuit Judge,* with whom Judge Aldisert joins, concurring.

I join in Chief Judge Seitz's concurring opinion. I write separately, however, to express my views with respect to a troubling feature of the majority opinion. As Chief Judge Seitz has recognized in note 1 of his concuring opinion, this case does not present claims involving nonreversible surgery or the administration of antipsychotic drugs. The majority concedes as much. Nonetheless the majority includes both of these procedures in its

discussion (Maj. Op. pages 29a-31a). That discussion is then apparently related to the jury charge which appears as III C in the Appendix (Maj. Op. page 47a), requiring as a constitutional measure the application of a "least intrusive treatment" standard where "significant deprivations of liberty" occur.

The problem with including this discussion and this charge in this case is apparent. It is crystal clear that the Plaintiff here had neither alleged nor suffered from non-reversible surgery. Nor did he allege or suffer from being medicated with a powerful anti-psychotic drug. Thus, the entire discussion in the majority opinion which refers to these two conditions is gratuitous and constitutes no more than dictum. Moreover, while it may be contended that this discussion of surgery and drugs was only to illustrate the thesis that various standards are needed to accommodate different levels of medical treatment, by referring to procedures outside the *Romeo* record and crafting jury instructions which govern these procedures, the majority has trenched directly upon a case which does concern the administration of anti-psychotic drugs and which is pending before this Court. That case, *Rennie v. Klein*, Nos. 79-2576 and 79-2577, was argued before this Court on April 22, 1980. The filing of the panel's decision has been withheld by a majority vote of the full Court, pending the filing of the present *en banc* opinion.

Rennie deals with the issue of the involuntary administration of anti-psychotic drugs to mentally *ill* patients (as distinguished from mentally *retarded* patients, the focus of the *Romeo* case). In *Rennie*, the trial of this issue produced an extensive record which centered wholly on the administration of anti-psychotic drugs. That record, and the issues arising from it, were fully briefed and argued

by the parties in *Rennie* before a panel of this Court. The decision in *Rennie* will therefore meet head-on the very issue of the requisite constitutional standards involved in the administration of anti-psychotic drugs which the *Romeo* majority by its equivocal discussion and purported adoption of a "least intrusive" standard seeks to influence, if not to establish, here. This has been sought to be accomplished notwithstanding the absence of an appropriate record in *Romeo* and without the benefit of analysis, argument, or briefing of the anti-psychotic drug issue by the parties in *Romeo.*

Thus, the multi-level series of standards adopted by the majority has now additionally resulted in bald dictum which purports to promulgate a legal standard involving the administration of anti-psychotic drugs—a standard that is wholly inappropriate for resolution in this case and one that may very well be rejected or modified by the holding of this Court in *Rennie v. Klein, supra,* the case which presents that very issue.

A True Copy:

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Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-3429

NICHOLAS ROMEO

v.

DUANE YOUNGBERG, RICHARD MATTHEWS and MARGUERITE CONLEY

MEMORANDUM

MC GLYNN, J.

Plaintiff Nicholas Romeo brings this action by his next friend and mother against the superintendent and other officials of Pennhurst Center, formerly Pennhurst State School and Hospital, wherein plaintiff resides. He alleges that defendants have failed to protect him from repeated beatings and similar physical abuse inflicted at the hands of other patients of the facility. Plaintiff asserts that this failure to provide adequate protection results in his confinement under conditions which constitute cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments and in violation of the Civil Rights Act of 1871, 42 U.S.C. §1983. Jurisdiction is invoked pursuant to 28 U.S.C. §§1331 and 1343 (3) and (4). Plaintiff seeks declaratory and injunctive relief to remedy the conditions of his confinement, and presents a claim for damages to compensate for previous injuries, some of which are alleged to be of a permanent nature. The complaint

also seeks to have defendants pay the costs of Mr. Romeo's care and treatment at any facility to which he may be transferred.

Nicholas Romeo is a twenty-eight year old severely retarded man whose mental development allegedly approximates that of a child of eighteen months. He is confined at Pennhurst for an indefinite period under an order of involuntary civil commitment entered by the Honorable Ned L. Hirsh on 11 June 1974. The complaint alleges that from July, 1974 to the present, plaintiff suffered a variety of injuries as a result of at least sixty-three attacks or beatings by unnamed third persons at Pennhurst. Defendants are alleged to have had personal knowledge of these attacks, but nevertheless failed to adopt protective measures despite a duty to provide plaintiff with reasonable care, all in violation of plaintiff's constitutional rights.

Currently before the Court is defendants' motion to dismiss, which asserts that the complaint fails to state a cause of action upon which relief can be granted, that this Court lacks subject-matter jurisdiction because plaintiff failed to seek habeas corpus relief in the Pennsylvania courts, and that the Eleventh Amendment bars any recovery against defendants in their official capacities.

Defendants' Fed. R. Civ. P. Rule 12(b) (6) motion to dismiss for failure to state a cause of action will be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80, 84 (1957). In making this determination, the allegations in plaintiff's complaint must be accepted as true. *Gardner v. Toilet Goods Association*, 387 U.S. 167, 87 S. Ct. 1526, 18 L. Ed. 2d 704

(1967). In the instant case, it does not appear that plaintiff can prove no set of facts sufficient to entitle him to relief. On the contrary, if the allegations of the amended complaint are proved, a cause of action under 42 U.S.C. §1983 will have been set forth. See *Parker v. McKeithen,* 488 F.2d 553 (5th Cir. 1974); *Roberts v. Williams,* 456 F.2d 819 (5th Cir. 1971), *cert. denied,* 92 S. Ct. 83 (1971); *New York State Association for Retarded Children, Inc. v. Rockefeller,* 357 F. Supp. 752 (E.D. N.Y. 1973). As plaintiff observes, confinement in a prison where violence and terror reign is actionable under the Eighth Amendment. *Woodhous v. Commonwealth of Virginia,* 487 F.2d 889 (4th Cir. 1973). Since persons civilly committed to state institutions are not criminals, they are entitled to conditions which are at least the same as those existing in prisons, and in some cases, conditions tolerated in the latter are impermissible in other state institutions. *New York State Association for Retarded Children, Inc. v. Rockefeller, supra.*

Defendants argue that only the Department of Public Welfare has the power and authority to cause plaintiff's transfer to another facility, and cite in support of this contention §416 of the Mental Health and Mental Retardation Act of 1966, 50 P.S. §4416. If this be the case, the appropriate resolution is to permit plaintiff to join the Secretary of the Department of Public Welfare as an indispensible third party rather than to dismiss the action. 3A Moore, Federal Practice, 19.19 at 2583.

However, while joinder of the Secretary of the Department of Public Welfare may well be desirable, it does not appear necessary to afford the relief sought by plaintiff should he prevail on the merits. The above-cited section of the Act provides in pertinent part:

> "(a) The department *may, upon application by the director of any state operated facility,* transfer a mentally disabled person to any other state operated facility under its jurisdiction. . . ." 50 P.S. §4416 (a) (Emphasis supplied).

Although plaintiff does not specifically ask that defendant Youngberg be ordered to seek such a transfer from the Department, his prayer for "other just and equitable relief" may be deemed to encompass such a request. In any event, plaintiff has indicated to the Court that a transfer to another institution would not be required if he could be placed in a safer ward within Pennhurst. Certainly defendants do not deny that they are empowered to effect such a transfer within their own institution.

Therefore, accepting plaintiffs allegations as true as I must, it is clear that the complaint states a cause of action sufficient to withstand defendants' Rule 12(b)(6) motion. *See Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976).

Defendants next argue that this Court lacks subject-matter jurisdiction to order Mr. Romeo's release and transfer because plaintiff has failed to exhaust his available state habeas corpus remedy, citing the exhaustion requirement of 28 U.S.C. §2254. While plaintiff clearly does have a state habeas corpus remedy available to him under 50 P.S. §4426, I am not persuaded that he must pursue such remedy under the circumstances of this case.

By its terms, 28 U.S.C. §2254 applies to habeas corpus actions in the federal courts by state prisoners. Since the instant case is one under 42 U.S.C. §1983 rather than the federal habeas statute, the exhaustion requirement of §2254 (b) is not directly applicable. Defendants, however, urge that plaintiff is challenging the fact or length

of his confinement, that the sole federal remedy is a habeas corpus action, and therefore, the exhaustion requirement of §2254 (b) does in fact apply. Plaintiff replies that he merely seeks to alter the location of his confinement.

Both parties cite *Preiser v. Rodriguez*, 411 U.S. 475, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973) in support of their respective positions on this issue. *Preiser* held that a §1983 action is an appropriate remedy for a prisoner who challenges on constitutional grounds the conditions of his incarceration, but not the fact or duration thereof. Here, plaintiff seeks a transfer to safer facilities where he will not be subjected to attacks by other patients, either within Pennhurst itself or to another state institution. He does not challenge the fact of his committment by Judge Hirsh, nor does he seek an unconditional release from Pennhurst without a transfer. Unlike *Preiser*, the relief sought in the case at bar would not affect the time at which Mr. Romeo is ultimately released. The mere fact that a transfer to another facility may necessitate a release from Pennhurst is not sufficient to constitute a challenge to the fact or length of plaintiff's confinement so as to preclude the instant §1983 action. The relief requested would only affect the location of confinement and would not effect an unconditional release.

An action under §1983 is therefore appropriate to the facts of this case. *Preiser v. Rodriguez, supra.* Plaintiff need not first seek redress in the state courts, with respect to his claim for damages or for equitable relief. *Preiser v. Rodriguez, supra; Clutchette v. Procunier*, 497 F.2d 809 (9th Cir. 1974).

Finally, defendants argue that the Eleventh Amendment bars any recovery from them in their official capac-

ities. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). I agree. However, there is no dispute that the claim for damages against defendants individually is not barred. And to the extent that Mr. Romeo seeks *prospective* injunctive relief to cure any unconstitutional conditions that may be found to exist at Pennhurst, which relief would require the incidental expenditure of state funds, the effect on the state treasury is merely ancillary and is not barred by the Eleventh Amendment. *Edelman v. Jordan, supra.*

For the reasons set forth above, I will grant defendants' motion to dismiss to the extent that plaintiff seeks damages from them in their official capacities. In all other respects, defendants' motion to dismiss will be denied.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-3429

NICHOLAS ROMEO

v.

DUANE YOUNGBERG, RICHARD MATTHEWS and MARGUERITE CONLEY

ORDER

AND NOW, this 6th day of June, 1977, it is hereby ORDERED that defendants' motion to dismiss be and the same is hereby GRANTED to the extent that plaintiff seeks damages from them in their official capacities.

IT IS FURTHER ORDERED that defendants' motion to dismiss, in all other respects, be and the same is hereby DENIED.

By the Court:
Joseph L. McGlynn, Jr., J.
Joseph L. McGlynn, Jr., J.

Entered: June 8, 1977
Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action Number 76-3429

NICHOLAS ROMEO, an incompetent, by his mother and next friend, PAULA ROMEO,

Plaintiff

v.

DUANE YOUNGBERG, individually and in his official capacity as Superintendent, Pennhurst State School and Hospital,

and

RICHARD MATTHEWS, individually and in his official capacity as Director of Resident Life, Pennhurst State School and Hospital,

and

MARGUERITE CONLEY, individually and in her official capacity as Unit Director, Unit 9, Pennhurst State School and Hospital.

Jury Trial Demanded

SECOND AMENDED COMPLAINT

1. Jurisdiction is conferred on this Court by 28 U.S.C. §§1343(3) and (4), this being an action brought under the Civil Rights Act of 1866, 42 U.S.C. §1983. Jurisdiction is additionally conferred by 28 U.S.C. §1331,

this being an action arising under the Constitution and laws of the United States, the amount in controversy exceeding ten thousand dollars ($10,000).

2. Injunctive and declaratory relief is authorized by 28 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

3. Plaintiff NICHOLAS ROMEO is a citizen of the United States presently residing at Pennhurst State School and Hospital, Spring City, Pennsylvania. As an incompetent adult, he brings this action by his next friend and mother, PAULA ROMEO, who is a citizen of the United States and resides at 1136 McKean Street, Philadelphia, Pennsylvania.

4. Defendant DUANE YOUNGBERG is the Superintendent of the Pennhurst State School and Hospital located at Spring City, Pennsylvania (hereinafter referred to as PENNHURST). As Superintendent of Pennhurst, Dr. YOUNGBERG has overall supervisory authority over the operations of that facility.

5. Defendant RICHARD MATTHEWS is the Director of Resident Life at Pennhurst. As Director of Resident Life, he has day-to-day responsibility for the health and welfare of persons incarcerated in that facility.

6. Defendant MARGUERITE CONLEY is the Unit Director for the unit at Pennhurst in which plaintiff is incarcerated. In this capacity, she has responsibility to provide for the health and welfare of persons confined in that unit at Pennhurst.

7. Plaintiff is a twenty-eight year old profoundly retarded individual who suffers from a brain disorder such that his mental development approximates that of an eighteen month old child.

8. On June 11, 1974, plaintiff was involuntarily committed to Pennhurst for an indefinite period by the Honorable Ned L. Hirsh pursuant to the provisions of Section 406 of the Mental Health and Mental Retardation Act of 1966.

9. During the period July 1974 to the present, plaintiff has suffered injuries on at least sixty-three occasions. These injuries include: a permanently deformed finger; broken bones; injuries to his sexual organs; hepatitis; lacerations; scratches; black eyes; boils; and human bites.

10. These injuries were sustained by plaintiff as a result of attacks on him by third persons while he was incarcerated at Pennhurst.

11. The repeated attacks and beatings have led to plaintiff's hospitalization on several occasions, and have caused him intense pain and suffering.

12. All defendants had personal knowledge of these repeated attacks and beatings, but have failed to adopt such policies and procedures which would protec plaintiff from such attacks.

13. Defendants' refusal to provide plaintiff such care and attention as is required to prevent him from incurring repeated attacks and beatings constitutes an unconstitutional deprivation of plaintiff's rights as secured by the Eighth and Fourteenth Amendments to the United States Constitution.

14. At all times relevant hereto, all defendants acted in a manner which they knew or should have known was violative of plaintiff's constitutional rights, or in conscious disregard thereof.

15. The unconstitutional deprivation of plaintiff's rights by defendants have subjected him to repeated physical attacks and beatings, mental anguish, humiliation and suffering of the highest degree.

16. Defendants have failed to institute such policies and procedures as are required to assure plaintiff a reasonable degree of physical safety.

17. Defendants, by failing to adopt such procedures to prevent plaintiff from incurring repeated attacks and beatings have breached their duty to provide plaintiff reasonable care.

18. Defendants' breach of duty to plaintiff has subjected him to repeated attacks and beatings, mental anguish, humiliation, and suffering of the highest degree.

19. As a result of the aforementioned conduct by defendants, plaintiff continues to suffer irreparable harm: to wit, continued beatings and assaults endangering his life and limb.

20. Subsequent to the filing of plaintiff's complaint in the instant matter, defendants have caused plaintiff to be transferred to the Medical-Surgical Hospital Building at Pennhurst. ("Pennhurst Hospital")

21. While in the Pennhurst Hospital, plaintiff has received no treatment for his mental retardation whatsoever, nor has he participated in any training or recreation programs.

22. While in the Pennhurst Hospital, defendants and their agents, have caused plaintiff to be shackled to his bed or otherwise physically restrained for long periods of time each day.

23. As a direct result of defendants' refusal to provide plaintiff treatment or programs, and as a direct result of defendants' actions in shackling plaintiff to his bed, or otherwise restraining him, plaintiff suffers and continues to suffer extreme physical pain, mental anxiety and suffering.

24. Defendants have intentionally and maliciously taken the above-described actions in order to punish plaintiff for filing the instant action and in order to compel plaintiff to withdraw it.

25. Defendants' transfer of plaintiff to the Pennhurst Hospital, shackling him to his bed and otherwise physically restraining him and refusing to provide him treatment or programs for his mental retardation, constitutes an unconstitutional deprivation of plaintiff's rights as secured by the Eighth and Fourteenth Amendments to the United States Constitution.

26. Other State Facilities, such as the Woodhaven Center, exist which have vacancies and which could provide NICHOLAS ROMEO with treatment and programs for his mental retardation, without the constant use of shackles and other physical restraints such as those presently used upon plaintiff.

27. Defendants have refused to seek plaintiff's transfer to such facilities, despite Ms. PAULA ROMEO'S repeated requests that they do so.

28. Defendants have refused to seek plaintiff's transfer to such facilities, despite recommendation and requests of Pennhurst employees and other mental retardation professionals that defendants do so.

29. Defendants' refusal to seek plaintiff's transfer to a mental retardation facility which could provide plaintiff appropriate treatment and programs without the constant use of shackles and other forms of physical restraints, constitutes an unconstitutional deprivation of plaintiff's rights as secured by the Eighth and Fourteenth Amendments to the United States Constitution.

30. Defendants' unconstitutional deprivation of plaintiff's rights to such a transfer has caused plaintiff intense physical pain, mental anguish, humiliation and suffering of the highest degree.

31. Defendants have intentionally and maliciously refused to seek such a transfer in order to punish plaintiff for filing the instant action, and to coerce him to withdraw it.

WHEREFORE, plaintiff prays that this Court:

1. Take jurisdiction over this claim;

2. Grant declaratory relief holding defendants' failure to provide for the physical safety of plaintiff and refusal to provide him treatment in the least restrictive alternative to be violative of the civil rights of plaintiff;

3. Grant injunctive relief requiring that defendants place plaintiff in the custody of a mental retardation facility which will provide plaintiff a reasonable degree of physical safety, and treatment in the least restrictive alternative, requiring that defendants pay the costs of his care and treatment at any such facility;

4. Grant injunctive relief requiring defendants to cease refusing to provide plaintiff with treatment and programs for his mental retardation and to cease shackling plaintiff to his bed and using other means of physical restraint upon him for long periods each day;

5. Award plaintiff compensatory damages in the amount of one million dollars ($1,000,000) and punitive damages in the amount of two hundred thousand dollars ($200,000);

6. Award his attorney's fees; and

7. Grant such other relief as this Court deems just and equitable.

(s) Edmond A. Tiryak
Edmond A. Tiryak
Elliot B. Platt
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PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

* * * * * * * *

8. Plaintiff Nicholas Romeo asserts that his constitutional rights were violated by defendants in four ways. He first contends that defendants' failure to provide him with a reasonable degree of protection from repeated assaults by patients and staff at Pennhurst violates his rights under the Eighth Amendment to the United States Constitution.

9. The Eighth Amendment forbids the infliction of cruel and unusual punishment upon persons confined to state mental institutions. Thus, if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo, such failure to act deprived plaintiff of rights guaranteed by the Eighth Amendment.

Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974); *Halderman v. Pennhurst*, Civ. A. No. 74-1345 (E.D. Pa. Dec. 23, 1977); *Welsh v. Likins*, 373 F. Supp. 487, 502-3 (D. Minn. 1974), *aff'd in part, and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *New York State Ass'n for Retarded Children, Inc., v. Rockefeller*, 357 F. Supp. 752, 764 (E.D. N.Y. 1973).

Note also that this statement is the "law of the case." See *Romeo v. Youngberg*, Civ. A. No. 76-3429 (June 6, 1977).

10. Plaintiff Nicholas Romeo also contends that this Eighth Amendment right to be free from cruel and unusual punishment was violated after this lawsuit was filed by the

defendants unnecessarily shackling him to his bed or chair and denying him the opportunity to participate in the same treatment and programs as other residents at Pennhurst. Plaintiff contends that defendants shackled him and denied him programs to punish him for filing this lawsuit.

If you find that any or all defendants shackled or caused Nicholas Romeo to be shackled to his bed or chair, or denied him programs as a punishment for filing this lawsuit, those acts deprived plaintiff of rights guaranteed by the Eighth Amendment.

11. Plaintiff also contends that his rights under the Fourteenth Amendment to the United States Constitution were violated by defendants. The Fourteenth Amendment to the Constitution provides in relevant part that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

12. Under the Fourteenth and Eighth Amendments, state officials at a state mental hospital have a duty to protect involuntarily committed residents from repeated attacks by other patients and staff. Plaintiff Nicholas Romeo contends that these defendants violated such a duty to protect him, because they were aware of such attacks, and failed to take such reasonable steps as required to protect him.

13. Under the Eighth and Fourteenth Amendments, state officials at a state mental hospital have a duty to provide residents of such institutions with such treatment as will afford them a reasonable opportunity to acquire and

maintain those life skills necessary to cope as effectively as their capacities permit. If you find that defendants failed to provide plaintiff with such treatment, then you must find that plaintiff's Eighth and Fourteenth Amendment rights were violated.

See, e.g. Welsch v. Likens, 550 F.2d 1122, 1132 (8th Cir. 1977); *Nelson v. Heyne,* 491 F.2d 352, 360 (7th Cir. 1974) *cert. denied* 417 U.S. 967 (1974). *See also Scott v. Plante,* 532 F.2d 939, 947 (3d Cir. 1976).

14. Once admitted to a state mental facility, residents such as the plaintiff in this case also have a constitutional right to treatment under the least restrictive conditions consistent with the purpose of the commitment.

Plaintiff contends that he was shackled to his bed or chair for long periods of time each day after he filed this lawsuit. If you find that he could have been provided treatment under less restrictive conditions than those imposed upon him, then you must find that his constitutional rights were violated.

See Halderman v. Pennhurst, supra; Eubanks v. Clarke, 434 F. Supp. 1022 (E.D. Pa. 1977) (per Lord, Ch. J.); *J. L. v. Parham,* 412 F. Supp. 112, 139 (M.D. Ga. 1976) (three-judge court), *appeal pending* U.S. , 97 S.Ct. 2647 (1977); *Gary W. v. Louisiana,* No. 74-2412 (E.D. La., filed July 26, 1976), *modified,* October 28, 1976; *Woe v. Mathews,* 403 F. Supp. 419, 428 (E.D. N.Y. 1976), *remanded in part dismissed in part sub nom. Woe v. Weinberger,* 556 F.2d 563 (2d Cir. 1977); *Suzuki v. Quisenberry,* 411 F. Supp. 1113, 1132-33 (D. Hawaii 1976); *Lynch v. Baxley,* 386 F. Supp. 378, 392, (M.D. Ala. 1974); *Davis v. Watkins,* 384 F. Supp. 1196, 1206 (N.D. Ohio 1974); *Saville v. Treadway,* 404 F. Supp. 430 (M.D.

Ala. 1974); *Welsch v. Likens*, 373 F. Supp. 487, 502 (D. Minn. 1974), *aff'd in part and vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *Morales v. Turman*, 383 F. Supp. 53, 124 (E.D. Tex. 1974), *rev'd and remanded on other grounds*, 535 F.2d 864 (5th Cir. 1976) *judgment of Court of Appeals rev'd and remanded*, U.S. , 97 S.Ct. 1189 (1977); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part and decision reserved in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1096 (E.D. Wisc. 1972) (three-judge court), *vacated and remanded on other grounds*, 414 U.S. 473 (1974); *Dixon v. Attorney General of the Commonwealth of Pennsylvania*, 325 F. Supp. 969, 973-4 (M.D. Pa. 1971) (Consent Decree).

15. To find for plaintiff, you need not find that defendants personally participated in any attack upon plaintiff. If you find that defendants were aware of repeated attacks upon plaintiff, and failed within their sphere of authority to take reasonable steps to protect plaintiff, then you must find that defendants are liable for a violation of plaintiff's constitutional rights.

Sims v. Adams, 537 F.2d 829 (5th Cir. 1976); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Holland v. Connors*, 491 F.2d 539 (5th Cir. 1974) (per curiam); *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972) *cert. denied* 409 U.S. 885 (1976); *Byrd v. Briske*, 466 F.2d 6 (7th Cir. 1972); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971) *reversed on other grounds* 409 U.S. 418 (1973); *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971) *cert denied* 404 U.S. 866 (1971).

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

(6-3) (Now, 9:30 a.m., Monday, April 24, 1978, trial resumes in the presence of the jury.)

MR. TIRYAK: I call Dr. Richard Fox.

MR. McGUIRE: We would ask for an offer of proof.

* * * * * * * *

THE COURT: All right.

What is the doctor's name?

MR. TIRYAK: Richard Fox, Your Honor.

(6-4) THE COURT: What is he going to testify to?

MR. TIRYAK: Your Honor, for purposes of the offer of proof, I will not go into his qualifications.

THE COURT: All right.

MR. TIRYAK: Dr. Fox is going to testify that he has examined Nicholas Romeo at Pennhurst.

Incidentally, Dr. Fox is a psychologist. His specialty is on the behavior and programming of mentally retarded individuals.

He is going to testify he has examined Nicholas Romeo.

He has visited Ward 52 at Pennhurst.

He has reviewed all programming records at Pennhurst with respect to Nicholas Romeo and all accident reports both in a situation where Nicky was the cause of the injury and where he was injured.

He has also reviewed the Pennhurst policies with respect to programming, the DAPT Manual, which I think has been referred to previously, and the Pennhurst Modification Policy.

He is going to offer his professional opinion that the injuries Nicholas Romeo received on Ward 52 was a direct result of the lack of programming on that ward, (6-5) both programming for the aggression of mentally retarded individuals there and for self-help skills.

He is also going to testify that the aggression on that ward, both by Nicholas Romeo and the other residents, was as a result of a lack of activities that the residents there had.

He is going to testify why there is that correlation, that is, the lack of programming and activities of mentally retarded people in a ward such as Ward 52 at Pennhurst would cause a situation to arise where the individuals there learned aggressive behavior since the only attention they would receive on such a ward would be when staff intervened seeing an act of violence taking place.

He is also going to testify there are numerous scientific programs available to reduce the aggressive behavior of mentally retarded people, many of which, several of which Dr. Fox has invented himself or has resolved.

He is going to testify as to the various types of programs that are available.

He is also going to testify these programs are available at Pennhurst itself. They are written up in the DAPT Manual, and he reviewed that DAPT Manual in Ward 52 at Pennhurst.

(6-6) He will further testify that it is ethically required—let me start again.

Dr. Fox will further testify that in choosing among the various techniques to reduce aggression a psychologist is ethically required to first adopt the least restrictive means possible to achieve the result which is reduction of aggression.

He will testify what that means is that in a situation where there are a number of programs available to reduce aggression, the psychologist is first required to choose that method that does not use restraints and that there is no dispute in the scientific literature with respect to that conclusion.

He will testify that only one program of the ones that are available to reduce aggression was ever attempted to be applied to Nicholas Romeo, that program being the differential reinforcement of other behaviors.

He will testify that in reviewing the records on that particular program that the persons who applied the program to Nicholas Romeo did not follow professional standards in conducting the program, that the program was not evaluated scientifically or, in fact, that the program was not done even according to the standards in the DAPT Manual at Pennhurst itself.

(6-7) He is also going to review the muff program which there has been some testimony about. That was the one, Your Honor, that Mrs. Romeo declined to sign her consent to.

He is going to testify there was a violation of professional ethics in choosing that, in offering that program at all since it did not comport with the ethical principle of following the least restriction model.

He is also going to testify that since the least restrictive model itself was incorporated in the Pennhurst be-

havior modification policy, then the suggestion of using that muff program on Nicholas Romeo in itself violated Pennhurst's own policy.

Finally, he is going to testify that that program if applied to Nicholas Romeo would not have worked in his professional opinion since scientific principles were not properly specified in respect to the positive reinforcement which can be applied, that is, the rewards which would have been offered to Nicholas Romeo if he did not engage in aggressive behavior.

Similarly, he will testify that the lack of the programs on Ward 52 to increase self-help skills—these are the toilet training, dressing and the like skills—also played a role in the injuries that Nicholas Romeo (6-8) received because there is an interrelationship between those programs, the occupation of the time of the residents on Ward 52 and aggression.

He will testify that when mentally retarded individuals learn alternative behavior, such as toilet training and dressing and so forth, the aggression decreases.

He is also going to testify that programs, properly conducted programs for such self-help skills are available at Pennhurst again, as specified in the DAPT Manual which is available on Ward 52.

He is then going to review several self-help skills programs which the defendants have described and which this document here, which is D-10. In all occasions he is going to testify that scientific principles were violated in one manner or another in the way the programs were implemented.

As a result of doing all of these programs his testimony will be Nicholas Romeo's self-help skills deteriorated over the time period that he was at Pennhurst.

Finally, he is going to testify with respect to the use of visible restraints upon Nicholas Romeo at Pennhurst. He will testify, he, himself, has used physical restraints on mentally retarded individuals and describe (6-9) the circumstances under which such restraints are required.

He will testify that he has reviewed the restraint records at Pennhurst and evaluated Nicky and his opinion is that the use of restraints presently applied on him in the hospital is not in any way even designed to reduce his aggressive behavior. Rather, the restraints are used for the convenience of staff.

He will testify he, meaning Nicholas, is almost totally in restraints and that the result of applying restraints like that on Nicholas Romeo is, again, a deterioration in his self-help skills and an increase in his aggressive behavior when he is out of restraints.

He will also testify as to the psychological damage the use of restraints has done on Nicholas Romeo.

Your Honor, I think, if Your Honor please, would Your Honor like to see a copy of Dr. Fox's curriculum vitae at this point?

* * * * * * * *

(6-16) THE COURT: Yes. The Supreme Court said you can't turn a malpractice case into a civil rights case and so does the Third Circuit.

It seems to me that is the thrust of the testimony you are offering now.

So I will sustain the objection at this time. If you want to offer other evidence which would suggest the testimony might be appropriate, you can re-offer it at that time.

* * * * * * * *

(6-107) MR. PLATT: It is a physician by the name of Warren Grover. He has been deposed, by the way.

Without going through all of his background, he is an expert in pediatrics neurological pediatrics and he is the Medical Director of the Bancroft School in New Jersey, which is a private institution for the mentally retarded.

He will testify that he examined Nicholas Romeo, gave him a neurological examination, observed his gait, his arm use, his facial and eye movements and his (6-108) repetitive spontaneous movements.

He will testify that his diagnosis as to Nicky's retardation, his brain disfunction as a result of PKU—

THE COURT: What is that?

MR. PLATT: It is a chemical term we have heard a little bit before, I think, here.

It is either an abnormal chemical reaction or an enzyme which affects the brain cells. It is apparently irreversible, and he would just explain that a little bit.

I can't very well, frankly.

He will testify that when he examined Nicky, which was in February of 1978, he found that his right arm bent outwards, the one that was broken, and had incomplete extension.

The fifth finger on the left hand, the one that was broken, he found to be in a flexed fixed position that cannot be straightened.

I believe he will testify it is his opinion that the type of hepatitis Nicky suffered from is infectious and is caused by dirty syringes or contact with fecal matter and, if it was caused by fecal matter, it is his opinion that is the result of improper cleanliness.

Q. As to the cellulitis that Nicky suffered from, he will (6-109) testify that that is an infection that comes after an abrasion. It can and should be prevented with cleansing and protection from abuse, and that it should always be prevented.

He will testify that his impression of Nicholas Romeo's potential for skill development is that he could learn to feed himself, do some toilet training and dress himself, although that would take proper programming.

He doesn't know what the programming is, but he would respond to programming.

He has reviewed records from before Nicholas' commitment to Pennhurst. He has spoken with Mrs. Romeo and he has reviewed Pennhurst records and his own observations and he will testify that as a result of that, his opinion is that Nicholas has regressed in terms of his skills.

As to the frequency and type of injuries sustained by Nicholas, he will testify they are excessive and potentially mutilating, partly on the basis of the results of permanent injury, which is the nasal fracture and the fractures to the arms and the finger.

He has an opinion regarding the continuation at Pennhurst of Nicholas with the same programs and treatments and in his opinion he is not optimistic.

(6-110) To summarize the condition, he will testify Nicky has a history of slow development and seizures and is severely limited with an I.Q. of about 8 to 10, that at home his parents apparently had a program that was sufficiently successful to maintain him.

At Pennhurst the records and the mutilations show that programming is inappropriate and the results of that

inappropriate programming is abnormal behavior that makes his care difficult and he has also suffered from the bony lesions, and that Nicholas could develop skills.

He would testify at the Bancroft School there are residents like Nicky and they do not have problems of aggression or injury.

There is another matter he would testify to on damages, but as to liability that is it.

I am sorry, one thing, and from his examination he concludes that Nicky can feel pain.

* * * * * * * *

(6-112) THE COURT: I would think that the doctor could testify as to his observations upon examination. That is all, not his opinion as to whether or not the programming he is receiving or the treatment he is receiving at Pennhurst is adequate from his point of view.

MR. PLATT: I am not talking about the medical treatment. It is not a medical malpractice situation. We never said it was.

MR. McGUIRE: You are talking about psychological treatment and the witness testified in his deposition he wouldn't know what programs should be used.

THE COURT: He can testify to his medical observations, that he had a fracture of the arm, the nose and the finger, perhaps even that he could sense pain, but, other than that, it is only for the purpose of establishing damages and his corroboration of damages, but (6-113) not his opinion as to whether or not the program at Pennhurst is adequate for his needs.

MR. PLATT: You have to take into consideration his position also. He is Medical Director of a similar institution.

THE COURT: That makes it all the more a difference in opinion as to how this man should be treated.

That is a malpractice case, not a violation of civil rights.

* * * * * * * *

(6-114) Getting back to your question, the doctor's testimony would be admissible under damages only, not on liability.

If we are going to bifurcate it, I take it your next question would be should we have him here now and the answer is not until we send the issue of liability to the jury.

* * * * * * * *

(7-89) No. 13—

MR. McGUIRE: Your Honor, we object to this charge.

THE COURT: It is not a violation of the Eighth Amendment to fail to provide plaintiff with treatment. It is a violation of the Eighth Amendment if there is a deliberate indifference to the serious medical and psychological needs of the patient.

I will make that modification in No. 13, if plaintiff will accept it.

I am talking about the second sentence.

MR. TIRYAK: The second sentence?

THE COURT: Yes.

MR. TIRYAK: Would Your Honor have—

THE COURT: I am using the language of Estelle versus Gamble. It says if you find the defendants have failed to provide plaintiff with such treatment.

The Eighth Amendment does not require such treatment. The Eighth Amendment does require that you not be indifferent to the medical or psychological needs of the patient.

MR. McGUIRE: Your Honor, if I may speak further to this, if the Court intends to apply Estelle versus Gamble, I would say the first sentence of this charge is somewhat misleading.

It states there is a duty on the part of the (7-90) defendants to provide this very kind of training.

It would seem to be contradictory to say in the first sentence the duty exists and in the second sentence to say it does not. Therefore, we would request the entire charge be thrown out.

Furthermore, the record is entirely clear the plaintiff is not being held against his will.

MR. TIRYAK: We are not going to argue the evidence at this time, it seems to me, Your Honor.

The purpose of the instruction has to do with the question of the purpose of commitment of a mentally-ill person.

As I stated before, he is not committed for any purpose other than to provide him treatment. He could not be involuntarily confined there at a mental institution for any other reason than to give him treatment. It has to do with his personal liberty, and that goes to the O'Connor versus Donaldson case, which the Supreme Court decided, and which the court said they could not keep a resident at a mental institution unless they provided him treatment.

MR. McGUIRE: Your Honor, the unrebutted evidence in this case—

MR. WHEELER: Your Honor, this request for charge goes much further. It says with such treatment as will afford him a reasonable opportunity.

That is directed to quality and kind of treatment. (7-91) that is not what the Donaldson case says.

MR. TIRYAK: Your Honor, that language was taken from Judge Broderick's decision with respect to the duties owed by the officials at Pennhurst to the residents.

MR. McGUIRE: Your Honor, even if Judge Broderick's language is used, it is clear that language doesn't apply to the defendants in their individual capacities.

To be sure, Pennhurst may have that duty. However, Pennhurst is not on trial.

THE COURT: I think we have to try to zero in on these individual defendants, not the school itself.

MR. McGUIRE: These defendants, as individuals, owe nothing to Nicholas Romeo. Pennhurst owes a duty to him in some fashion.

Whether that duty is being carried out by Pennhurst, is not the subject of this litigation.

MR. ROMEO: Your Honor, the state has chosen these individuals.

THE COURT: The state is not a defendant here.

MR. TIRYAK: I understand that, but they have been delegated as state public officials.

THE COURT: Yes, but they are being sued in their individual capacity for violating the constitutional rights of this plaintiff.

MR. TIRYAK: That's correct, Your Honor.

(7-92) THE COURT: They are not being sued because they failed to give him care. They are being sued because they violated his constitutional rights.

MR. TIRYAK: Your Honor, if a police officer were to assault someone unjustifiably, one could recover damages against him under—

THE COURT: Individually. You can't recover against the City, though.

MR. TIRYAK: Correct, but even though he is acting as a public official, if you could show he was misusing the authority given to him—

THE COURT: Right, you have to show he was acting under color of law.

MR. TIRYAK: That's correct.

MR. McGUIRE: But, Your Honor, the distinction between that situation and the one before this Court is that it has already been conceded these defendants have done nothing personally to violate Nicholas Romeo's civil rights.

THE COURT: If they concede that, I would have to grant your motion.

MR. TIRYAK: That is not conceded.

MR. McGUIRE: We would submit the policeman illustration is entirely different. The policeman, as a public employee, is not entitled to step out to enjoy the protection of the state while he goes about battering citizens.

(7-93) THE COURT: I will use the language of Estelle versus Gamble which says if you find the defendants were deliberately indifferent to the medical and psy-

chological needs of Nicholas Romeo then you may find the plaintiff's Eighth Amendment rights were violated.

As modified, that is 13.

No. 14 is denied. As I have stated again and again, this is not a malpractice suit.

It makes no difference that somebody else would have done it differently.

* * * * * * * *

CHARGE OF THE COURT

(8-16) Plaintiff asserts that his constitutional rights were violated by the defendants in four ways. He first contends that defendants' failure to provide him with a reasonable degree of protection from repeated assaults by patients and staff at Pennhurst violates his rights under the 8th Amendment to the United States Constitution.

The 8th Amendment of the United States Constitution forbids the infliction of cruel and unusual punishment upon persons confined to institutions. The 8th Amendment specifically says excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted.

Thus, if any or all of the defendants were aware of and failed to take all reasonable steps to prevent repeated attacks upon Nicholas Romeo, such failure to act deprived the plaintiff of rights guaranteed by the 8th Amendment.

Plaintiff, Romeo, also contends that his 8th Amendment right to be free from cruel and unusual punishment was violated after this lawsuit was filed by the defendants unnecessarily shackling him to his bed or chair and denying him the opportunity to participate in the same treatment and programs as other residents at (8-17) Pennhurst.

Plaintiff contends that defendants shackled him and denied him programs to punish him for filing this lawsuit.

If you find that any or all of the defendants shackled or caused Nicholas Romeo to be shackled to his bed or chair, or denied him programs as a punishment for filing

this lawsuit, those acts deprived plaintiff of his rights guaranteed by the 8th Amendment.

On the other hand, if you find that these acts were taken by the defendants in a good faith effort to treat Nicholas Romeo's condition, then, of course, you should find for the defendants.

The plaintiff also contends that his rights under the 14th Amendment to the United States Constitution were violated by the defendants.

The 14th Amendment to the Constitution provides in relevant part that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the (8-18) laws."

Under the 14th and 8th Amendments, state officials at a state mental hospital have a duty to protect involuntarily committed residents from repeated attacks by other patients and staff.

Plaintiff, Nicholas Romeo, contends that these defendants violated such a duty to protect him because they were aware of such attacks and failed to take such reasonable steps as required to protect him.

If you find that the defendants were deliberately indifferent to the medical and psychological needs of Nicholas Romeo, then you may find that plaintiff's 8th and 14th Amendment rights were violated.

Now, ladies and gentlemen, this case is not a malpractice case. You are not to decide whether Nicholas

could have been treated in some other fashion or whether it could have been done in some other way or better way. That is not the issue in this case.

The issue here is whether or not his rights were violated.

Malpractice, that is, the failure to properly treat somebody or negligently treat somebody, does not become a constitutional violation merely because the victim is committed to the custody of a state institution.

(8-19) In order to prove his case the plaintiff must show acts or omissions sufficiently harmful to evidence a deliberate indifference to the serious medical needs of the resident. It is only such indifferences that can offend the standards of decency required by the 8th Amendment.

To find for the plaintiff you need not find that the defendants personally participated in any attack upon the plaintiff. If you find that the defendants were aware of repeated attacks upon plaintiff and failed within their sphere of authority to take reasonable steps to protect the plaintiff, then you may find that the defendants are liable for a violation of the plaintiff's constitutional rights.

On the other hand, if you find that the defendants took all reasonable steps under the circumstances to protect Nicholas Romeo from harm, then you should find for the defendants.

In evaluating the evidence and in determining whether any of the defendants have violated Nicholas Romeo's civil rights, the fact that Nicholas Romeo was injured on occasion, regardless of how many times, does not mean that the defendants caused that injury or that they violated his civil rights.

The mere fact that Nicholas was injured on one or more occasions does not permit you to draw the inference (8-20) that the injury or injuries was caused by any of the defendants or that any of the defendants was deliberately indifferent.

In order to show that the treatment of Nicholas Romeo was adequate under the Constitution the defendants need not show that the treatment would cure or improve Nicholas' condition, but only that they made a good faith effort to do so.

The treatment program, including treatment of the mentally retarded in residential groups, does not violate the Constitution merely because it has a negative therapeutic effect or because it has other undesirable side effects.

The plaintiffs have to prove a violation of Mr. Romeo's constitutional rights. The defendants, of course, as I stated earlier, contend his rights were not violated, but they also contend that even if his rights were violated, the actions they took were taken in good faith and, therefore, under the law they are not liable.

If based on the evidence in this case you find that the defendants or any of them violated plaintiff's civil rights, you must then consider whether or not they are entitled to immunity because they acted in good faith.

Good faith means a reasonable reliance on (8-21) the existing procedures and a reasonable belief in their validity at that time.

Immunity means they are not liable even if you found they violated the plaintiff's civil rights.

Under the law the defendants are entitled to immunity unless they knew or should have known that the action which they took within the sphere of their official respon-

sibility would violate Nicholas Romeo's established constitutional rights or if they acted with a malicious intent to cause a deprivation of his civil rights or other injuries.

In considering the evidence in this case you must remember that a mentally retarded patient has the same constitutional rights, but under the law the defendants cannot be held liable for the deprivation of any of plaintiff's civil rights unless they intended the acts which caused the violation of his civil rights, nor can they be held responsible for acts of their subordinates unless you conclude that each defendant had personal knowledge or reason to know that the subordinates were violating Nicholas Romeo's civil rights, had an opportunity to intervene or prevent such conduct and failed to do so.

However, if you find that the defendants did not personally act or fail to act which conduct resulted (8-22) in the violation of Nicholas Romeo's constitutional rights, then even if some other person who is not a party violated the plaintiff's rights, you must return a verdict for the defendants and against the plaintiff.

If you conclude from the evidence that Donnie James struck Nicholas Romeo in the shower, that fact, standing alone, is not sufficient to hold these defendants for violating Mr. Romeo's civil rights. In other words, the mere fact that someone else may have violated Mr. Romeo's civil rights, it does not necessarily follow that the defendants did so, even though he was a subordinate, as I explained to you earlier.

In order to establish this good faith defense each defendant has the burden to establish that by a preponderance of the evidence that his or her actions or inactions were made in good faith.

Ladies and gentlemen, I am not going to review the evidence. I think counsel has presented their respective positions to you ably and well and have reviewed the evidence for your benefit.

I have just given you the law which is applicable to this case and now it is your duty to deliberate and to return a verdict in accordance with the evidence and

* * * * * * * *

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 80-1314/1315 & 80-1596

ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

v.

DR. INGRE RUDOLPH PLANTE; COMMISSIONER OF INSTITUTIONS AND AGENCIES, ANN KLEIN; MEDICAL DIRECTOR OF NEW JERSEY STATE HOSPITAL, NEW JERSEY MENTAL HEALTH COMMISSIONER, DR. MARTIN WEINBERG; STATE OF NEW JERSEY, BRENDAN T. BYRNE, GOVERNOR; SUPREME COURT OF NEW JERSEY, RICHARD J. HUGHES, CHIEF JUSTICE

ALLEN B. SCOTT, *Appellant*

IN NOS. 80-1314 & 80-1596

DR. INGRE RUDOLPH PLANTE, ET AL

Appellants in No. 80-1315

On Appeal From the United States District Court for the District of New Jersey

(D.C. Civil No. 73-1052)

Argued September 18, 1980

Before: GIBBONS, WEIS and SLOVITER, *Circuit Judges*

(Opinion filed Feb. 5, 1981)

Michael J. Weintraub, *Esquire*
(Argued)
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Attorneys for Dr. Ingre Rudolph Plante, Ann Klein, Dr. Martin Weinberg

OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

Allen Bodine Scott appeals, and certain defendants cross-appeal, from a final judgment which disposed of all Scott's claims after trial of his numerous complaints charging violations of his civil rights. Several of those claims were submitted to a jury, which returned a verdict in his favor on two of them and in favor of the defendants on

one. On a post-trial motion the district court granted partial relief from the verdicts in Scott's favor. Those claims that were not submitted to the jury were tried to the court, which denied all requests for injunctive, declaratory and habeas corpus relief. What remains is a judgment on the jury verdict of one dollar nominal damages for violation of Scott's constitutional rights. We vacate and remand for further proceedings consistent with this opinion.

I.

Scott has been involuntarily confined to the Vroom Building, a maximum security section of the Trenton State Psychiatric Hospital, for approximately 25 years. In 1954 he was indicted by a grand jury in Burlington County, New Jersey, for the murder of his grandmother. In February 1955 a hearing was held in Burlington County in which a jury determined that he was mentally incompetent to stand trial, and an order was entered that he be removed from the County jail and confined to Trenton State Hospital "until such time as he may be restored to reason, but not to be released from such confinement except on the order of this court."[1] Scott was placed in the Vroom Build-

[1] The hearing was held pursuant to N.J.S.A. 2A: 163-2 (repealed 1978) which read in relevant part:

> If any person in confinement under commitment, indictment or under any process, shall appear to be insane, the assignment judge, or judge of the county court of the county in which such person is confined may, . . . institute an inquiry and take proofs as to the mental condition of such person. . . . It shall be competent for the judge, if sitting without a jury, or the jury, if one is impanelled, to determine not only the sanity of the accused at the time of the hearing, but as well the sanity of the accused at the time the offense charged against him is alleged to have been committed.
>
> . . . .

ing, where he has remained continuously, except for brief periods when he was returned to Burlington County to stand trial on the indictment. No trial ever took place. On October 7, 1968 the indictment was dismissed on the ground that Scott was insane when the offense was committed. Upon the dismissal of the indictment he was returned to Trenton State Hospital "until the further order of [the Burlington County] Court."[2]

In July of 1973 Scott filed in the District Court the first of a series of pro se complaints addressed to the fact and conditions of his confinement in the Vroom Building. By December 30, 1974 five such complaints had been filed.

(*Footnote* 1 continued:)

> If it shall be determined after hearing as aforesaid that the accused was insane at the time the offense charged against him is alleged to have been committed, the charge against him shall be dismissed on this ground and the records of the proceedings so noted. In this event, the judge or jury, as the case may be shall also find separately whether his insanity in any degree continues, and, if it does, shall order him into safe custody and direct him to be sent to the New Jersey state hospital at Trenton, to be confined as otherwise provided by law, and maintained as to expense as is otherwise provided for the maintenance of the criminal insane, until such time as he may be restored to reason, and no person so confined shall be released from such confinement except upon the order of the court by which he was committed. This section shall not be construed to prevent the use of the writ of habeas corpus.

[2] *See* N.J.S.A. 2A:163-2 (repealed 1978). The legal problems arising out of the order incarcerating a defendant found not guilty by reason of insanity are discussed in our prior opinion. Scott v. Plante, 532 F.2d 939, 948-49 (3d Cir. 1976). The current state law provisions, codified at N.J.S.A. 2C:4-6 (Supp. 1980), grant the judge discretion to commit civilly the accused to "an appropriate institution."

Scott repeatedly requested appointment of counsel pursuant to 28 U.S.C. §1915(d), but all such requests were denied. Early in 1975 all his complaints were summarily dismissed, and Scott appealed. We granted a motion for a certificate of probable cause, 28 U.S.C. §2253, and appointed counsel. In *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976), we reversed. Reviewing his complaints and the pleadings and affidavits on file, we discerned five separable claims:

> 1. That he had been subjected to the involuntary administration of psychotherapeutic substances, 532 F.2d at 945;
>
> 2. that he was being confined in the Vroom Building without treatment, 532 F.2d at 947;
>
> 3. that the physical conditions at the Vroom Building subjected him to violations of federally protected rights, 532 F.2d at 947;
>
> 4. that his confinement in the Vroom Building after the dismissal of the indictment was unconstitutional, 532 F.2d at 948; and
>
> 5. that the procedures by which New Jersey determined from time to time that his confinement must continue did not meet minimum federal due process requirements, 532 F.2d at 949.

We held that the district court erred in granting summary judgment on Scott's involuntary medication claims, and in granting a Rule 12(b)(6) dismissal on each of the remaining claims. In remanding for further proceedings we suggested that his request for the appointment of counsel pursuant to 28 U.S.C. §1915(d) be given serious consideration, 532 F.2d at 950.

II.

This court's judgment reversing dismissal of Scott's complaints was received by the District Court on April 21, 1976. On August 17, 1976 the court appointed Michael J. Weintraub, Esq. to represent him. Scott was dissatisfied with this appointment, and moved that the court dismiss Mr. Weintraub, and appoint instead David Ferleger, Esq. of the Mental Patient Civil Liberties Project in Philadelphia. On September 2, 1976 that motion was denied. No progress was made in disposing of the case for a considerable period. Meanwhile Scott filed pro se applications for interim relief in the form of the appointment of a manager to run Trenton State Hospital and stop the abuses of which he complained, and for a change of venue. On November 21, 1977 an order was entered:

> 1. Michael J. Weintraub, Esq., of 227 East Hanover St., Trenton, N.J. 08608 is appointed as guardian ad litem for the plaintiff, Allen Bodine Scott, for these consolidated actions, and is to serve in that capacity as well as his attorney.
>
> 2. The stay of these consolidated proceedings pending appointment of a guardian ad litem is vacated.
>
> 3. The requirement that a single amended complaint be prepared and filed is vacated, but without precluding the taking of that step at or before entry of pretrial order.
>
> 4. The consolidated cases will be reinstated to the active civil calendar.

The order is unusual in several respects. First, there is nothing of record disclosing by what procedure or on what authority the court acted in appointing a guardian

ad litem.[3] Second, there is no record of any order staying the proceedings pending such an appointment. Third, there is no record of an order requiring the filing of a single amended complaint. However, the absence of significant docket entries between September 2, 1976 and November 21, 1977 suggests that some action was taken by the court to stay the cases for reasons unknown.

On January 25, 1978 Michael J. Weintraub filed an amended complaint, bearing the docket numbers of the five consolidated cases which were before us on Scott's prior appeal. The prayers for relief of the amended complaint are quoted in the margin.[4] The factual allegations, while more concisely and artfully set out, preserve all the claims which we previously considered. The prayers for relief included virtually all modes of relief which it is

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[3] There is a docket entry on April 12, 1976 referring to an "order to show cause reappointing two independent expert witnesses, who are psychiatrists, to examine the plaintiff, etc." The certified record, however, lists this document (and many others) as "missing." There is no docket entry or record document disclosing any disposition of the order to show cause.

[4] WHEREFORE, plaintiff demands that this Court:

A. Issue an order that the plaintiff be released since his confinement is illegal in that the standard applied in his commitment, hearing was a liberal one whereas the standard applied in determining his release has been a more stringent test;

B. Ordering that the plaintiff be released from his confinement for the failure of the defendants to treat or otherwise attempt to rehabilitate the plaintiff;

C. In the event that this Court does not find that the plaintiff is entitled to release as requested in paragraphs A & B, that this Court enter an Order transferring the plaintiff to the civil section of the hospital in accordance with the requirement that the least restrictive means of confinement be utilized;

within the power of the court to grant to the plaintiff. An answer was filed on behalf of all defendants on February 23, 1978. Thereafter on March 13, 1978 the court filed a memorandum and order granting leave to file an amended complaint. The memorandum and order refer to a prior order directing that an amended complaint be filed, and to an order vacating the order, neither of which appear of record. The memorandum also refers to another Scott complaint, No. 78-2367, in which he seeks habeas corpus relief, and directs that it be consolidated with the five cases we had previously consolidated. An order to

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(*Footnote 4 continued:*)

D. Enter a declaratory judgment that the utilization of a less stringent test for the plaintiff's original commitment and the utilization of a more stringent test for his release to be violative of the plaintiff's right to due process under both the United States and New Jersey State Constitutions;

E. Enter a declaratory judgment that the standard of proof to be applied in release hearings in determining whether or not the plaintiff is either a danger to himself or to others be that standard of proof beyond a reasonable doubt;

F. Enter a declaratory judgment that in the event that the confinement of the plaintiff is warranted, it must be the least restrictive confinement;

G. Enter a declaratory judgment that if the confinement of the plaintiff is found to be warranted, that an individual treatment plan specifically designed for the plaintiff alone, must be immediately implemented within thirty (30) days;

H. Enter a declaratory judgment that if the confinement of the plaintiff is warranted, that the defendants must provide for adequate medical and psychiatric care, and that the same should include at a minimum, the requirement for a complete physical once every six (6) months;

I. Enter a declaratory judgment that the defendants' failure to provide for sanitary and otherwise minimally humane living conditions, including adequate heat, constitutes a

that effect was entered on October 3, 1978, and the defendants' answer to the complaint in No. 78-2367 was filed seven days later. On October 18, 1978, thirty months after our mandate was received by the district court, a status conference was held. There is no record of what transpired at this conference. Nothing more transpired about scheduling the cases for trial until February 15, 1979, when the district judge to whom it was assigned sent a memorandum to Mr. Weintraub, and to the District Court clerk, but not to the Attorney General who was representing the defendants asking to be advised "as to necessary time for final trial preparation so date can be set." Meanwhile Scott sent to this court and to other places a number of letters asking for disposition of his case. Finally, on April 23, 1979 an order was entered by the Chief Judge of the District Court reassigning the case to himself and reallocating the place of trial from Newark to Trenton. Chief Judge Fisher promptly scheduled a trial date and issued a writ of habeas corpus ad

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(Footnote 4 continued:)

violation of the plaintiff's constitutional rights to be free from cruel and unusual punishment;

J. Enter a declaratory judgment that the failure to allow the plaintiff at hearings to determine his release to produce witnesses on his own behalf, to have the hearing open to the public, and to be furnished with a written decision containing a statement of the reason for the decision, constitutes a violation of plaintiff's constitutional rights to a meaningful hearing under the due process clause of both the New Jersey State and United States Constitutions;

K. Enter an order preliminarily and permanently enjoining the defendants, their agents, successors, employees, and all other persons acting in concert or participation with them, or at their direction or under their control, from further ad-

testificandum for Scott's appearance. The trial commenced on May 31, 1979, 37 months after the date our mandate reached the district court, and 58 months after Scott first sought relief in the district court.

III.

At the trial Scott testified and also presented the testimony of Dr. Robert Sadoff, a psychiatrist, and 58 exhibits. The exhibits were for the most part excerpts from the records about his condition and treatment maintained by Trenton Psychiatric Hospital during the course of his stay. Others dealt with the physical condition of the Vroom Building. Still others were written complaints by Scott and by his mother to various state officials, including defendants, respecting his treatment and the conditions he was being subjected to.

At the end of the plaintiff's case the court, on motion by the Attorney General, dismissed the State of New Jersey as a defendant, ruling that it was not a "person" sub-

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(Footnote 4 continued:)

ministering any medication without first obtaining the proper consent in accordance with law;

L. Entering preliminarily and permanently a mandatory injunction to compel the defendants, their agents, successors, employees, and all other persons acting in concert or in participation with them or at their direction or under their control, compelling them to provide a sanitary cell, providing heat in the cell which heat should be at a minimum of 68° during the day and at a minimum of 60° during the night, and otherwise provide for minimally humane and safe living conditions;

M. Enter, preliminarily and permanently, a mandatory injunction compelling the defendants, their agents, successors, employees, and all other persons acting in concert or in participation with them, or at their direction or under their control,

ject to suit under 42 U.S.C. §1983. The court also dismissed as defendants Governor Brendan T. Byrne, on the grounds that there was no evidence he either participated in or knew of and allowed continuance of any wrong to Scott, and the Chief Justice and members of the Supreme Court of New Jersey, because "I can't tell the Supreme Court to enforce their rules. . . ." (Transcript, June 6, 1979, at 44). Motions to dismiss were rejected as to the remaining defendants, Dr. Ingre R. Plante and Dr. Martin

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(Footnote 4 continued:)

to provide an individual treatment plan designed specifically for the plaintiff alone within thirty (30) days;

N. Enter, preliminarily and permanently, a mandatory injunction compelling the defendants, their agents, successors, employees, and all other persons acting in concert or participation with them, or at their direction, or under their control, to provide that hearings to determine the release of the plaintiff be opened to the public and that the plaintiff be allowed to present witnesses on his behalf, and that the plaintiff be allowed to receive a written decision which decision shall include a statement of reasons for the decision;

O. Enter, preliminarily and permanently, a mandatory injunction compelling the defendants, their agents, successors, employees, and all other persons acting in concert or participation with them, or at their direction or under their control, to provide a law library for the plaintiff or in the alternative access to an existing law library in order that the plaintiff's access to the courts not be further impeded;

P. Judgment for damages, both compensatory and punitive, for the illegal detainment of the plaintiff, for the failure to provide an individual treatment plan for the plaintiff, for the failure to otherwise provide adequate medical and psychiatric care and treatment for the plaintiff, for the failure to provide minimally humane and safe living conditions, and for the administration of medication without first having obtained the proper consent.

Weinberg, who each held the positions of Chief Executive Officer and Medical Director of Trenton Psychiatric Hospital, and Ann Klein, State Commissioner of the Department of Institutions and Agencies, of which Trenton Psychiatric Hospital is a part.[5] The court also dismissed all of Scott's state law claims, which included false imprisonment, assault and battery, and malpractice. Neither the transcript nor the court's post-trial opinion discloses whether the state law claims were dismissed for failure of proof or as a matter of discretion with respect to the exercise of pendent jurisdiction. The effect of these rulings was to dismiss the State, the Governor, and the Supreme Court of New Jersey not only on the damage claims which were going to the jury, but also on any claims for injunctive or declaratory relief on either state or federal grounds. Dismissal of the pendent state law claims also withdrew from the case any possibility of an award of money damages or injunctive or declaratory relief on those claims.

The defendants' case included the testimony of Harvey Musikoff, Acting Chief Executive Officer of Trenton Psychiatric Hospital, who was from October 1977 to April 1978 Chief of the Forensic Section of that hospital, contained in the Vroom Building, Dr. Musikoff holds a Ph. D. in rehabilitation counseling and has taught forensic psychology. While he was on the stand five packets of hospital records, Exhibits D-1 through D-4 and Exhibits D-8, were marked in evidence, comprising all records relating to Scott for his entire stay in Vroom. The defendants also introduced Exhibit D-5, a group of documents dealing with requests to the Governor and the Legislature

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[5] The Attorney General represented all defendants. No cross-claims were filed.

for additional funding for the Vroom Building over the past four or five years. Finally Exhibits D-6 and D-7 included various New Jersey State court orders dealing with Scott's confinement. The defendants presented no medical testimony. None of the three defendants left in the case testified. Instead, at the close of Dr. Musikoff's testimony they renewed their motion to dismiss the complaint. The court denied that motion.

IV.

Only the claims for money damages were submitted to the jury. Those were submitted in the form of special verdict interrogatories to which the defendants made no objection. The interrogatories and the jury's answers are as follows:

1. Was the plaintiff deprived of adequate treatment while at Trenton State Hospital Forensic Unit? Yes

2. If the answer to No. 1 is "yes," was that deprivation the proximate cause of injury and damage to plaintiff? Yes

3. Was plaintiff forced to undergo harmful or painful modes of treatment over his refusal? No

4. If the answer to No. 3 is "yes", was it the proximate cause of injury and damage to plaintiff?

5. Were the physical conditions at the Vroom Building such as to amount to a deprivation of due process? Yes

6. If the answer to No. 5 is "yes", was it the proximate cause of injury and damage to plaintiff? Yes

7. Do you find liability as to any of the following defendants? Yes

Ingre R. Plante, M.D. Yes
Ann Klein Yes
Martin Weinberg, M.D. Yes

8. Compensatory Damages $15,000.
Punitive Damages $10,000.

Thus the case was, with the defendants' apparent acquiescence, submitted on three separate theories, against three separate defendants, but with a request for a single verdict on compensatory damages and a single verdict on punitive damages. It appears, therefore, that the jury found the defendants jointly and severally liable for compensatory and punitive damages. The special verdict interrogatories predicate liability on deprivation of adequate treatment and on deprivation of due process with respect to the conditions of incarceration in the Vroom Building, but do not separate the damages among the two bases of recovery. Since the defendants did not in the trial court object to the form of the interrogatories either before or after the verdict, and do not on appeal argue that they were prejudiced by the way the questions were formulated, we must read them in a manner which reconciles them with the jurors' probable intention in light of the Court's instructions. *Cf. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.* 369 U.S. 355, 364 (1962); *Bernhart v. Dollar Rent A Car Systems, Inc,* 595 F.2d 914, 917 (3d Cir. 1979) (resolution of facially inconsistent answers to special interrogatories).

> In its instruction to the jury the court observed that the plaintiff breaks his claims against defendant[s] down to three categories: First, the right to treatment, secondly, the right to refuse treatment and thirdly, that the conditions of the Vroom Building,

> that is as you have heard them, were a violation of his Constitutional rights to due process.

The jury's verdict was adverse to Scott on the alleged violation of a right to refuse treatment, and he does not on appeal raise any question about that verdict. Thus we are concerned only with his right to receive treatment and his condition of confinement claims.

On the right to treatment claim the Court charged:

> Now, while the plaintiff was confined to Trenton State Hospital, Forensic Unit thereof, which you have heard so much about, he had a right to adequate medical treatment. This right arose from the 14th Amendment of the United States Constitution which provides no State shall deprive any person of life, liberty or property without due process of law. Plaintiff was committed because he was dangerous to himself and to others. That is in the first instance. Remember, he has never been convicted of a crime. In exchange for his commitment which society was entitled to, the State owed plaintiff adequate medical treatment. You, the jury, must decide whether plaintiff received the treatment which was owed.

Although the defendants contended in the trial court, and contend here, that an involuntarily committed patient has no federally protected right to treatment, they made no objection to the quoted portion of the charge; in particular, they made no request for a more specific definition of adequate treatment, and made no objection to the language "he had a right to adequate medical treatment." In *Romeo v. Youngberg*, No. 78-1982, (3d Cir. Nov. 25, 1980) (en banc) we held that the involuntarily committed mentally retarded have a constitutionally protected right to treatment, and the analysis of that case is for fourteenth

amendment purposes equally applicable to the involuntarily committed mentally ill. *Id.*, slip op. at 32 n.53. Thus we have rejected the defendants' basic position that there is no federally protected right to treatment. The quoted portion of the charge is less complete with respect to such a right than the one which in *Romeo v. Youngberg, supra,* we held to be appropriate,[6] but no more specific charge was requested and no objection was made. The charge informed the jury, correctly, that Scott, as a patient involuntarily committed for mental illness, had a right to treatment, and the verdict reflects the jury's conclusion that he was deprived of that right.

As to the conditions of confinement, the Court charged:

> Now . . . [Scott] also contends that the conditions at the Vroom building amounted to punishment

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[6] Proposed jury instructions were set forth in an appendix to *Romeo*:

> A. If you find that the plaintiff was involuntarily committed for treatment, and no treatment was administered, and no compelling explanation for the lack of treatment was offered, you may hold the defendants liable.
>
> B. If you find that the plaintiff has received some treatment, you must then determine whether the treatment is regarded as acceptable in light of present medical or other scientific knowledge. If you find that it is not acceptable, you may find for the plaintiff. In addition, if the evidence does not demonstrate that there is a relationship between the treatment administered and the plaintiff's needs, even if the treatment is arguably regarded as acceptable in other situations, then you may find for the plaintiff. In deciding upon the adequacy of the treatment program adopted you may consider the defendants' explanations regarding security concerns, administrative necessities and fiscal constraints.

Slip op. at 42.

without due process of law and violation of the Civil Rights Act.

You have heard evidence which described the conditions of the Vroom building in which plaintiff has been confined for 24 years. You must remember that at no time was plaintiff convicted of a crime. Therefore, I Charge you that the State could not Constitutionally punish him. You must determine whether the conditions existing in the Vroom building amounted to punishment.

Not every disability or loss of liberty which plaintiff has experienced is punishment. You must remember that the State originally saw fit to confine him because he was deemed to be dangerous but unable to stand trial. Loss of some freedom of choice and privacy are inherent in confinement and do not rise to the level of punishment, and the fact that detention interfered with the plaintiff's desire to live as comfortably as possible and with as little restraint as possible did not mean that he was being punished. A number of factors should guide your decision of whether plaintiff was being punished.

Were the conditions and disabilities of Vroom imposed by officials for the purpose of punishment? If not, then is the condition which you are considering reasonably related to a legitimate government objective, or is it arbitrary or purposeless? Besides the State's objective of keeping a dangerous individual off the streets, you should realize that the government has a legitimate interest that stem [sic] from it's [sic] need to manage the facility in which plaintiff was detained. These governmental interests include the maintenance of security and order at the

> institution. Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, amount to punishment. However, if the conditions or restraints are excessive in relation to the State's non-punitive purpose, you may find they constituted punishment.

This charge gives meaning to the jury's answer to interrogatory No. 5. That affirmative answer establishes that the jury concluded that Scott, who has not been convicted of a crime, has been confined in the extremely harsh restrictive conditions of the Vroom Building for reasons not related to legitimate government objectives, i.e., as punishment. Defendants did not object to this portion of the trial instructions, and none of their requests to charge are inconsistent with it.

Having charged the jury that Scott had a right to treatment and a right to be free from punishment the court turned to the issue of personal responsibility. In that respect the Court charged:

> If you decide that plaintiff was given adequate treatment, you need decide no more. But if you find his treatment was inadequate, you must next determine whether either Ann Klein, Dr. Ingre Rudolph Plante, or Dr. Martin Weinberg were responsible for the denial of treatment.
>
> Since Ann Klein was not involved with the day-to-day running of the institution, you obviously won't be able to find that she actually participated or acquiesced in any denial of treatment. She can only be liable if you find that she had actual knowledge of the Vroom building's inadequate treatment of the plaintiff, while having the power to authorize or im-

plement better care for him. You could find this knowledge, not only by direct evidence, but also by proof, that defendant Klein normally exercised reasonably close supervision over the defendants personally charged with the plaintiff's care and that those defendant's [sic] acts or omissions were open and not surreptitious.

With respect to Doctors Plante and Weinberg, you could apply the same test in determining whether they had actual knowledge to [sic] the inadequacies of plaintiff's treatment and also, had the resources in [sic] authority to remedy the situation.

Plante and/or Weinberg might also be liable for their actual participation in a denial of plaintiff's rights by denying him a right to treatment. You must decide whether either of those two doctors actually was engaged in a course of conduct calculated to deny plaintiff his right to treatment.

The defendants did not object to this portion of the charge. They did, however, request a charge on vicarious liability, and urge as error the Court's failure to give it.[7] The charge as given, however, is substantially as requested and accords with the standard for personal liability in §1983 actions set forth in *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3d Cir. 1976). The charge on personal responsibility deals specifically only with fail-

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[7] The charge requested is:

"It is well settled in this circuit that liability based directly upon 42 U.S.C. §1983 cannot be based on a theory of vicarious liability, but instead requires actual participation in the unlawful conduct, or actual knowledge of an acquiescence in that conduct." Coggins v. McQueen, 447 F. Supp. 960, 966 (E.D. Pa. 1978).

ure to treat Scott. Defendants made no objection, however, to the court's failure to relate that portion of its instruction to the unlawful punishment claim, and made no request for a charge addressed to that issue.

Finally the Court turned to the issue of official immunity, charging:

> Now, the defendants in this case are All State Executive Branch officials. They claim that they are immune from having to respond in money damages to plaintiff's claim. This claim of immunity is offered as a defense to plaintiff's claim and the officials have the burden of convincing you by a preponderance of the evidence that immunity should attach.
>
> There are two components to the immunity defense. Keep in mind also, that plaintiff has a number of claims which you must keep distinct for purposes of applying the defense.
>
> If you find that plaintiff was subjected to punishment without due process, you must decide which of the defendants, if any, knew or should have known of plaintiff's right to be free from punishment and if they knew or should have known that their conduct or omission would or did violate the law. The foregoing inquiry is relevant only to the issue of punishment through conditions.
>
> The immunity defense would be unavailable to defendants on all plaintiff's claims, right to treatment, right to refuse treatment and punishment, if you find that any of the defendants acted or failed to act with malicious intention to deprive the plaintiff of a right or to cause him other injury. For the purpose of determining whether any defendant possessed malice,

> you must decide whether or not he intended the consequences of his conduct or omission.

The charge as given was not objected to. It must, however, be contrasted with several instructions requested by the defendants. Most of them were properly rejected because they were framed in such a manner as to place the burden of offering evidence and of persuasion on the plaintiff. We have held that qualified immunity is a defense on which the defendants have the burden of proof. *Skehan v. Bloomsburg State Teachers College*, 590 F.2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979).

One request, however, is worthy of note. The defendants asked for a charge:

> Monetary damages can only be assessed against a defendant if he or she "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff]. . . .
>
> "For purposes of this question, an official has, of course, no duty to anticipate constitutional developments." *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975).

The defendants contend that the charge as given fails to comply with *O'Connor v. Donaldson's* "two-step test for official immunity" (Appellee's Brief 3-D), although their brief does not elaborate. The charge as given provided, with respect to all of plaintiff's claims, that the immunity defense "would be unavailable to the defendants . . . if you find that any of the defendants acted or failed to act with malicious intention to deprive him of a right, or to

cause him other injury." The negative implication of the language seems to be that absent malice the defense is available. As to the lesser standard, "that he knew or should have known", the court applied that standard only to the punishment claim. The court's intention seems to have been to require a finding of malice to overcome the immunity defense on the right to treatment claim, while requiring a finding either of malice or of knowing disregard of a known constitutional right with respect to the punishment claim. Such a distinction would be entirely consistent with the position of the defendants, pressed both in the district court and here, that the law with respect to a constitutional right of the involuntarily committed to treatment was highly unsettled. *See Reese v. Nelson*, 598 F.2d 822, 826 (3d Cir. 1979). A fair reading of the charge, then, seems to be that it required a finding of qualified immunity on the right to treatment claim unless malice were shown. This was more than the defendants sought in the quoted request to charge, and on this record possibly more than defendants were entitled to. That this may have been their contemporaneous understanding is confirmed by their failure to object when given an opportunity to do so at the close of the court's instructions. If there was ambiguity in the manner in which the court articulated the immunity charge it could not ordinarily be considered now, for "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires stating distinctly the matter to which he objects and the grounds of his objection." Fed. R. Civ. P. 51; *see Fisher v. Volz*, 496 F.2d 333, 348 (3d Cir. 1974).[8]

[8] Because a new trial on liability and damages is granted on other grounds to be discussed later, the district court will have an

V.

Thus the legal standards which the court below used to instruct the jury and assess plaintiff's equitable claims were substantially correct. Resolution of the remaining questions on appeal depends on whether the law was correctly applied to the particular facts of this case.

We turn first to Scott's appeal from the judgment dismissing all requests for injunctive, declaratory, and habeas corpus relief. We believe that in two respects the trial court erred in denying equitable relief.

A. Conditions of Confinement

The jury found, and the court agreed, that confining Scott in the maximum security wing of Trenton Psychiatric Hospital amounted to punishment in violation of the due process clause. There was ample evidence that Scott and the other inmates were exposed for twenty four years to subhuman living conditions, including poor plumbing with leaking pipes covering the floor with inches of water; inoperative sinks and toilets; inadequate ventilation; absence of windows or inoperative windows; inability during seven months of the year to go into the yard for fresh air; inoperative radiators resulting in indoor temperatures below 50°; summer temperatures reading 105° due to absence of ventilating equipment; for a time availability of showers only once a week; and absence of hot running water in sinks in the cells. As to many of these gross physical deficiencies the testimony was not even disputed. The record discloses no treatment or security reason for subjecting

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(Footnote 8 continued:)
opportunity to make its charge on the "good faith" defense more specific so that the nature of the defense will be clearly presented to the jury.

Scott and the other inmates to such severe deprivations. To the contrary, there was evidence in the form of hospital records suggesting that Scott has neither engaged in violent behavior nor been a management problem. Indeed, a 1971 report by a Dr. Folmer of the hospital staff recommends that he be placed in a civil ward because of his cooperative behavior. Nevertheless, he remained through trial (and is to date) confined to a prison wing of the hospital which includes sentenced inmates suffering severe mental illnesses.

In the face of such harsh confinement, Scott petitioned for complete release, or, in the alternative, for transfer from the prison wing to a civil ward. The court concluded that the relief of complete release from custody was not, in Scott's present condition, appropriate. That finding is not clearly erroneous. At a minimum, however, this record required that the court make findings of fact as to whether Scott could be housed in surroundings less restrictive of his personal liberty. Courts have a duty to guard against unnecessary personal restraints not only at the confinement stage, which can range from maximum to minimum security.[9] As one court has observed, "It

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[9] Courts have not limited "least restrictive" analysis to a choice between outpatient services and institutionalization. Within this Circuit, the doctrine has been used to make finer distinctions. Thus, in Eubanks v. Clarke, 434 F. Supp. 1022 (E.D. Pa. 1977), Chief Judge Lord wrote:

> Fundamental rights are implicated where the state civilly commits an incompetent person to a mental hospital which is substantially more restrictive than other state mental hospitals to which one could be sent.
>
> . . .
>
> We hold that at a minimum, where a state has varying available facilities for the mentally ill which differ significantly in the amount of restrictions on the rights and liberties of

makes little sense to guard zealously against the possibility of unwarranted deprivations prior to hospitalization only to abandon the watch once the patient disappears behind hospital doors." *Covington v. Harris*, 419 F.2d 617, 623-24 (D.C. Cir. 1969). In that case, a plaintiff, whose circumstances closely resembled Scott's,[10] was granted a hearing at which the hospital was required to demonstrate that it had considered alternative security accommodations for appellant and to explain why it had found them inadequate. We find Scott is entitled to the same."

(Footnote 9 continued:)

the patients, due process requires that the state place individuals in the least restrictive setting consistent with legitimate safety, care, and treatment objectives.

434 F. Supp. at 1027-28. *See also* Kesselbrenner v. Anonymous, 33 N.Y. 2d 161, 305 N.E. 2d 903, 905 (1973) (transfer of civilly committed patient, believed dangerous, to penal facility for the criminally insane without consideration of less restrictive alternatives held unconstitutional).

[10] Covington was charged with murder, but civilly committed after being found incompetent to stand trial. In ten years at the maximum security pavilion he had never been violent or unruly.

[11] There is no justification for treating material differences among intramural dispositions as *de minimis*. Indeed, the Supreme Court has not ignored differences of degree within the context of criminal incarceration. *Cf.* Wolff v. McDonnell, 418 U.S. 539, 571-72 n.19 (1974) (prisoner entitled to due process safeguards when officials substantially increase the severity of his confinement). The argument for judicial review in the civil commitment context is even stronger.

Although Scott was initially placed under maximum security, this fact does not relieve the state of any obligation to justify continuing imposition of such severe restrictions. *Cf.* Donaldson v. O'Connor, 422 U.S. 563, 574-75 (1975): "Nor is it enough that [the inmate's] original confinement was founded upon a constitutionally adequate basis, . . . because even if his involuntary commitment was initially permissible, it could not constitutionally con-

Precedent in this Circuit supports this conclusion. In *Romeo v. Youngberg, supra,* we held:

> The basis of Romeo's first claim, that he was unduly shackled, is clearly inimical to the right of an unconvicted citizen to be free from punishment. Shackling may not be punishment per se, but it raises a presumption of a punitive sanction. It squarely collides with a traditional liberty interest in freedom from bodily restraint. A valid involuntary commitment *ex necessitate* extinguishes a retired person's right to freedom from any type of confinement. Nevertheless, a residuum of liberty remains which is entitled to due process protection.

Slip. op. at 13-14. After *Romeo* shackling may be justified only by a "compelling necessity" or by showing that it was "the least restrictive method of dealing with the patient in light of his problems and the surrounding environment." Slip. op. at 16. That holding applies, as

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(Footnote 11 continued:)
tinue after that basis no longer existed." Since Scott filed his amended complaint in 1978, the State of New Jersey has itself, recognized that the condition of civilly committed patients is subject to possible change and thus now utilizes mandatory periodic review procedures in state courts to tailor restraints to changed circumstances. *See* New Jersey Court Rules 4:74-7(f) (1980); State v. Fields, 77 N.J. 282, 390 A.2d 574 (1978). When the state fails in a *Fields* hearing to justify continuance of the status quo, the judge "model[s]" a new order providing for "the least restrictive restraints" found "consistent with the well-being of the community and the individual," 390 A.2d at 584. The record shows no such hearing being held in Scott's case and the trial court made no findings as to the reasons why, if any. The analogy to state law does not stay the hand of this court to remedy denial of Scott's federally-protected constitutional rights, but it does suggest that our holding today need not inevitably flood the federal courts with petitions for relief.

well, to Scott.[12] Although Scott was not shackled, the severe restrictions on movement and deprivations of sanitary, healthful conditions experienced by inmates in the Vroom Building qualitatively resemble shackling, and so likewise raise "a presumption of a punitive sanction."

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[12] The fact that Scott is mentally ill and possibly dangerous, rather than retarded, as Romeo was, affects only the nature and weight of the state's justifications for its restraints. *Romeo* left no doubt, however, that all civilly committed patients, both dangerous and non-dangerous, were entitled to have the conditions of their confinement subjected to strict scrutiny. Both enjoy the right of unconvicted citizens to be free from punishment. Both enjoy a right to treatment, and thus to the extent severe physical deprivations and restraints are contra therapeutic, such measures conflict with one of the original rationales for confinement.

Although some patients may be so dangerous that only maximum confinement can adequately protect the safety of others, courts should not conclude that all patients committed on grounds of dangerousness must be so confined permanently. Our understanding of mentally ill persons believed dangerous remains sadly limited; but at least one research study suggests that states may have been employing unnecessarily restrictive forms of confinement for them. The results were reported in Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1107, 1136-37 (1972):

> [Baxtrom v. Herold, 383 U.S. 107 (1966)] had the effect of forcing the state of New York to transfer 992 patients from Matteawan, an especially secure hospital for the criminally insane, to regular mental hospitals elsewhere in the State. Researches followed all 992 patients for a year. They found that all but seven of the 992 had fared well enough in less secure, often unlocked facilities that the new hospitals had not seen a need to seek their return to more secure facilities. Indeed, 147 were discharged to the community, far more than would have been released from Matteawan in an average year, and those who remained in regular hospitals seemed indistin-

Our decision in *Romeo* acknowledged as much[13] and indicated that the judicial restraint perhaps appropriate to consideration of inadequate treatment claims should not apply when courts are asked to judge alternative environmental dispositions within the institution. Slip. op. at 14 n.24 & 32 n.55. Although the assignment of a patient to the maximum security wing of a hospital may involve the exercise of medical prognosis, just as the choice of treatment does, the court has a greater obligation to review constraints involuntarily imposed than it does treatments a state offers to willing patients. *Cf.* slip. op. at 25 (limits placed on state's power to impose drastic treatments without patient's consent). Moreover, whereas courts may lack the resources or inclination to evaluate day-to-day therapeutic prescriptions, they are well suited

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(Footnote 12 continued:)

guishable to the staffs from the general hospital population. The study may provide little firm indication of how the same men would have fared if never hospitalized at all or if placed initially in a minimum security hospital, but it should increase courts' skepticism both about claims that a person is dangerous and about claims that hospitalization is necessary. [citations omitted].

[13] We made clear in *Romeo* that our holding extended beyond the use of locks and chains. Deference to administrative and fiscal constraints must give way, we indicated whenever a claimed post-commitment abridgment "reach[es] the status of a gross deprivation or squarely cut[s] across constitutionally protected interests. . . ." Slip op. at 12. Obviously not all unpleasant conditions of confinement, some of which are inherent in large-scale institutions, constitute "gross deprivations." Although no doubt the line between punishment and discomfort is not always a bright one, nonetheless we are convinced that severe restrictions on intramural mobility or unsanitary, climatically extreme conditions which endanger health amount to punishment and cannot be ignored by courts.

to examine a discrete long-term state action such as the fact and conditions of Scott's confinement in the Vroom Building. *Cf. Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 102 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3797 (1980) (Nos. 79-1404/1408/1414/-1415/1489) (Congressional mandate to courts to enforce least restrictive standards for personal liberty under Developmentally Disabled Assistance and Bill of Rights Act). Any reservations over applying least restrictive analysis to the conditions of temporary detainment[14] must yield when the deprivation of liberty can last as long as 24 years or more.

Scott was therefore entitled to have the court below carefully consider his petition for transfer from the maximum-security pavilion to a civil psychiatric wing of the hospital. Before denying the request, the court must be satisfied that hospital officials have considered the existing alternative residences and found that no less restrictive setting would be sufficient to secure adequate protection from threatened harm.[15] The district court's opinion below contains no findings that the subhuman conditions at the Vroom Building were necessary to the state's legitimate interest in protection,[16] or that Scott's

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[14] *Cf.* Bell v. Wolfish, 441 U.S. 520 (1979) (pretrial detainees, 85% of whom were released within 60 days).

[15] Far from being justified by an overriding state interest, excessive physical restraints would conflict with the state's interest as proclaimed in N.J.S.A. §30:4-24.2(e)(2), which entitles mental patients, civilly committed because dangerous, "to the least restrictive conditions necessary to achieve the purposes of treatment."

[16] Defendants' principal defense at trial for the disgraceful living conditions at the Vroom Building was budgetary constraint. With regard to bodily restraints, *Romeo* expressly indicated that

placement in other, less restrictive surroundings available at Trenton Psychiatric Hospital was ever tried or considered and found unworkable. To the contrary, there are strong indications in the record that he could be moved to a civil ward where his liberty would be less restrained and his surroundings would be more comfortable.[17]

The fashioning of an appropriate decree respecting Scott's future custody is a matter which should be addressed by the trial court in the first instance. But even if it is determined that no place but the Vroom Building is secure enough to house Scott, specific relief from its intolerable physical conditions should be ordered. They are not justified by a "compelling necessity" related to the purposes of confinement. Instead, they are at best the result of insufficient funding, which *Romeo* held was not an adequate excuse. Slip op. at 16.[18]

(Footnote 16 continued:)
"except in emergency situations, inadequate resources or administrative rationales offer an insufficient basis for intrusions of this kind on a fundamental liberty interest." Slip op. at 16.

[17] In addition to Dr. Folmer's report, noted earlier, there was even testimony that such transfer was offered to Scott as an inducement for him to drop this suit.

[18] Although defendants' lone witness, Dr. Musikoff, testified that some physical improvements had recently been accomplished and that several more were planned, nonetheless the budget requests submitted by defendant Klein and introduced as exhibits indicate that such promises provide inadequate assurance. For example, a new forensic facility was proposed, but eventually deleted from 1978 bond issue legislation. Even a $500,000 budget request for "emergency repairs" to the Vroom Building was only listed 12th in priority in the Hospital's capital budget request for FY 1980. As for Scott's placement in a cleaner, improved cell beginning December, 1978, we note that his testimony reveals several

B. *Adequate Treatment*

The jury also found, and the court agreed, that Scott has been unconstitutionally denied treatment. Scott's own testimony, that of his expert, Dr. Sadoff, and the hospital records reveal that no staff member worked with plaintiff individually on a regular basis; that neither a psychiatrist nor a psychologist has seen him individually on any regular basis in the twenty four years of his confinement; that ten years after his confinement a staff physician filed a report that there was no reason to bother trying to treat him; that recently a treatment team was established, but it met with him for only ten to fifteen minutes a month;[19] and finally, that he had not received any psychiatric counseling for almost a year and a half prior to trial. Indeed, it is undisputed that Trenton Psychiatric Hospital lost its hospital accreditation several years ago partly because the treatment offered its inmates was merely custodial and not therapeutic.

The court denied prospective relief, however, noting:

> Although he must be accorded all possible consideration and treatment, plaintiff's medical future cannot be directed through this court, but must depend upon the determination of experts as to his individual requirements and needs. I am satisfied from

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(Footnote 18 continued:)
transfers from one cell to another over the past several years. In light of these considerations—budgetary restraints and the apparent frequency of cell transfers—we believe Scott is entitled to the protection of a specific injunction.

[19] The jury may have been unimpressed with such testimony in light of testimony by plaintiff's expert witness that "suitable" treatment requires one and preferably two or three such sessions per week.

> the information provided at the motion hearing in September that definitive steps have been taken and will continue in order to rectify any deficiencies in that regard.

Memorandum at 10. This is not a satisfactory disposition of Scott's claim for injunctive relief with respect to lack of treatment. It is of course the case that his medical future must depend upon medical judgment as to his individual requirements and needs. *Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 114 (3d Cir. 1979), *cert. granted*, 48 U.S.L.W. 3797 (1980) (Nos. 79-1404/1408/1414/1415/1489). But he has been substantially without the benefit of such medical assistance for 24 years, he has been in court seeking it since 1973, and even today the State's brief contends that he is not constitutionally entitled to it. The court refers to definitive steps already taken, but there is nothing of record disclosing what those steps are or what assurance there is that they will continue. Scott contends, and we agree, that he is entitled to the protection of a specific injunction.

Scott also contends (1) that the trial court erred in denying his habeas corpus petition to be released completely from custody; (2) that the court erred in denying relief respecting a law library in the Vroom Building. The court's findings of fact on these claims are not clearly erroneous and denial of relief with respect to them was a permissible exercise of discretion. Finally, Scott contends that the court erred in entering judgment in favor of Governor Brendan T. Byrne and the Justices of the New Jersey Supreme Court. There is no evidentiary basis for any damage claim against these defendants, and they do not appear to be necessary parties for the equitable relief we have held should be considered.

VI.

In response to special interrogatories, the jury returned verdicts in favor of Scott as to both the treatment and punishment claims, on the basis of which they awarded both compensatory and punitive damages. Defendants Plante, Klein and Weinberg filed a motion for judgment notwithstanding the verdict or alternatively for a new trial. We must depend on the trial court's recital of the grounds for this motion for it is among the docketed pleadings which in the certified record are "missing." The court treated the motions separately and in considering the motion for judgment notwithstanding the verdict dealt separately with the claims for punitive and for compensatory damages.

A.

Despite the motion for judgment notwithstanding the verdict, the compensatory award was upheld on several grounds. First, the court denied the motion as to the verdict on the treatment claim. Appealing from that denial, defendants urge that as a matter of law a person confined because he is a danger to self or others has no constitutional right to any treatment. That contention lacks merit. Had Scott been at large he might have been in a position to seek the treatment which would alleviate his mental illness. As we have held in *Romeo v. Youngberg, supra*, the state may not both deprive him of the liberty to seek treatment and of the treatment as well.

> The right to treatment or habilitation in the case of the mentally retarded—arises when an individual is involuntarily committed, regardless of whether *parens patriae* or police power grounds provide the major premise for the confinement.

Romeo v. Youngberg, supra, slip op. at 25; *accord, Eckerhart v. Hensley,* 475 F. Supp. 908, 915 (W.D. Mo. 1979).

The defendants also contend that as a matter of law they were entitled to judgment notwithstanding the verdict by virtue of the eleventh amendment, since they were acting in official capacities as state officers. That contention is frivolous. *Ex Parte Young,* 209 U.S. 123 (1908); *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824).

Defendants also urge that they should have been granted judgment notwithstanding the verdict because there is no evidentiary basis for the verdict that they personally violated Scott's rights. In that respect we must examine separately the treatment claim and the punishment claim.

In discussing the propriety of injunctive relief in Part V, we reviewed the evidence indicating that Scott's right to treatment had been violated. In addition to the testimony and hospital records, from which the jury could have found an absence of adequate treatment, there was the opinion of Dr. Sadoff that Scott's chances of improvement were probably diminished by the lack of treatment in the early stages of his institutionalization. Even the one witness presented by the defendants, Dr. Musikoff, conceded that earlier treatment might have led to improvement. Moreover, there was evidence from which the jury could have found that the individual defendants were personally responsible for the lack of treatment or aware of it and in a position to remedy that lack. Such knowledge could be inferred from the fact that the inadequacies of treatment which eventually resulted in loss of accreditation in 1977 must have been apparent long before that time to these

defendants. Also, the jury could find that in addition to receiving complaints from Scott, Commissioner Klein and Dr. Weinberg made occasional on-site inspections of the Vroom Building. Dr. Weinberg even sat in on group treatment sessions which Scott attended and was quoted in his affidavit as saying that he was familiar with Scott's treatment in his role as plaintiff's custodian.

On the basis of this record, the trial court was thus correct to conclude that a judgment notwithstanding the verdict for lack of evidentiary support on the treatment claim would be improper. Although the jury was told to consider the case against each defendant separately, no provision was made for a discrete assessment of damages against each based upon their individual acts. Once again, since the point was not raised by the defendants, it must be deemed to have been waived.

As to the punishment claim, there was likewise ample evidence—reviewed in Part V—that the subhuman living conditions at the maximum security prison wing to which Scott has been confined amounted to punishment. As noted with respect to the discussion of the treatment claim, the jury could find that the defendants knew of his, complaints, of the availability of alternative environments, and of their own power to arrange for them. The jury could have found that there was no treatment or security reason for subjecting Scott to such severe deprivations, in which event, the trial judge instructed the jury they were to find the defendants liable. Therefore, the evidence was sufficient to support the jury's finding that Scott's confinement was unconstitutional under the lenient rationality standard charged by the trial judge, let alone under the "compelling necessity" standard we adopted in *Romeo v. Youngberg, supra.*

Finally, defendants also contend that their motion for judgment notwithstanding the verdict should have been granted because they were entitled to a directed verdict that they were covered by official immunity. The trial court, rejecting that contention, observed:

> The good faith immunity argued by defendants is qualified in nature and not absolute in a §1983 action. The charge properly placed the burden of persuasion for this defense upon the defendants . . . and it was fully within the province of the jury to reject it as they did in making a compensatory award.

Memorandum at 4. We agree. In reviewing a motion for judgment notwithstanding the verdict, we must determine, without weighing the credibility of the evidence, and giving Scott, who secured the jury verdict, the benefit of all reasonable inferences that can be drawn from that evidence, whether reasonable minds could not come to a different conclusion. *See Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1177-80 (3d Cir. 1976), and cases cited. The right to have facts found by a jury, guaranteed by the Seventh Amendment, applies no less to civil rights actions than to conventional tort cases.

Reviewing the record in light of the foregoing strict standard, we cannot say the jury was compelled to find that defendants had established their requisite good faith. First, we note that the violations for which they were found liable are not acts of negligence. Punitive conditions or the absence of any treatment become constitutional violations because the justifications put forward by the state are not compelling.[20] The substance of the viola-

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[20] *See* Instructions I and III-A in the appendix to *Romeo v. Youngberg, supra*, slip op. at 41-42.

tion does not necessarily indicate the individual defendants' state of mind at the time the acts occurred or the reasonableness of their legal position, which, together, are the focus of inquiry for official immunity purposes. Pertinent to that inquiry was testimony from which the jury could have inferred that defendants withheld treatment, despite recognition that institutionalization without such treatment tends to deepen a patient's mental incapacity. Under such circumstances the jury might conclude that the defendants knowingly caused injury to Scott and, therefore, could not in good faith have believed they were acting within the law. Indeed, there was evidence that the defendants acted in disregard of the New Jersey law governing their institution and entitling its patients to adequate treatment and habitation.[21] It was harder still for official immunity to overcome the punishment claim, given that the right of citizens—even in institutions—to be free from inhumane conditions has long been undisputed. *See Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976).

If defendants' position is that they innocently misconceived the law or had found it unsettled, they should have supplied evidence to that effect at trial. The risk of non-persuasion with regard to the qualified immunity defense is placed squarely on the defendants. *Skehan v. Bloomsburg State Teachers College, supra.* Yet none of the named defendants in this case even appeared to testify. The testimony of Dr. Musikoff does not touch on the beliefs of the defendants in the reasonableness of their respective courses of conduct, or on their knowledge of the governing legal standard. Indeed, the record contains no

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[21] *See N.J.S.A.* §30:4-24.2; State v. Carter, 64 N.J. 382, 316 A.2d 449 (1974); State in Interest of RGW, 145 N.J. Super. 167, 366 A.2d 1375 (J & D. R. Ct. 1976).

evidence suggesting that the right to treatment or to be free from punishment was in their mind unsettled. Dr. Musikoff's evidence touches only slightly on the tardy efforts, if any, defendants took to improve Scott's treatment or the conditions of his confinement beginning in 1977. Evidence of budgetary appeals by defendants in recent years to improve treatment and conditions at Vroom Building was certainly admissible, but evidence of their good faith with regard to the institutional population as a whole does not resolve as a matter of law the issue of their good faith towards the individual plaintiff in this case, whose specific plight the jury could have found was utterly ignored. On this record the jury certainly could conclude, as it obviously did, that defendants failed to carry their burden of proof on the good faith immunity defense.

B.

The trial court granted the defendants' motion for judgment notwithstanding the verdict on the claim for punitive damages. Scott appeals from that order. As in the previous discussion of such motions on the liability claims, we must avoid weighing the credibility of the evidence and must give Scott, who secured the jury verdict, the benefit of all reasonable inference that can be drawn from that evidence. The standard is the same as that for the grant of a directed verdict, and in reviewing the record we owe no particular deference to the trial court's determination, but must make our own. *See Fireman's Fund Ins. Co. v. Videfreeze Corp., supra,* 540 at 1177-80.

In addition, we must be mindful of the legal standards governing the award of punitive damages in §1983 actions. The award of punitive damages is authorized by that aspect of the law of torts having to do with admoni-

tion rather than compensation. Such an award punishes wrongdoing beyond the requirements of compensation both as a discouragement of private retribution and as a deterrent against future misconduct The admonitory standard requires that the factfinder determine that the defendants "acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so. . . ." *Cochetti v. Desmond*, 572 F.2d 102, 106 (3d Cir. 1978). Moreover,

> . . . although punitive damages are not a favorite of the law and are to be allowed only within narrow limits,
>
> [t]he allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of fact.

Fisher v. Volz, 496 F.2d 333, 347 (3d Cir. 1974), *quoting Lee v. Southern Home Sites Corporation*, 429 F.2d 290, 294 (5th Cir. 1970).

Mindful of these principles, we nonetheless confess to uneasiness about imposing exemplary damages against these defendants based on the existing record. We note, for example, Commissioner Klein's efforts—albeit unsuccessful—to get money from the legislature for upgrading the Vroom Building. In light of these efforts, we believe an inference of malice or wantonness must be based on more than her specific awareness of Scott's plight derived from two letters, both of which she forwarded to appropriate subordinates. This is not to say that the rec-

ord conclusively vindicates the Commissioner's role in this case. When the evidence is simply too sparse to determine the punitive damages issue one way or another, and plaintiff bears the burden of proving malice or wantonness, *Cochetti v. Desmond, supra*,[22] perhaps a jury award of punitive damages cannot stand.

However, the insufficiency of the evidence on this issue warrants close examination, since the circumstances of this case are somewhat unusual. We traced earlier in Part II, the sluggish treatment of plaintiff's case which eventually required reassignment of the case to Newark from Trenton and prompted quick assignment of a trial date. This unorthodox course of events may explain why no pretrial conference was held, far enough in advance of trial to assist the parties in preparing their case. Realizing for the first time at trial the importance of demonstrating Commissioner Klein's personal responsibility and obtaining subjective evidence, plaintiff's counsel at that time served a subpoena on the Commissioner in order to obtain her testimony. Despite plaintiff's protestations, the trial court quashed the subpoena. That ruling no doubt hampered plaintiff's ability to carry his burden of proof on the issue of punitive damages.

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[22] Plaintiff cannot be heard to complain that our rejection of defendants' immunity defense necessarily implies sufficient bad faith has been shown to support punitive damages. The defense of official immunity depends on defendants establishing good faith, and we concluded in Part VI-A that they failed to carry this burden. With respect to punitive damages, however, it is the plaintiff who bears the risk of non-persuasion on the issue of malice or recklessness. We, therefore, find nothing inherently inconsistent about upholding the judgment of liability for violation of constitutional rights, while expressing doubts about the award of punitive damages.

We need not decide then whether the lower court's direction of judgment notwithstanding the verdict was valid on the existing record. Even when such a motion is granted, if the insufficiency of evidence is attributable to trial error, the defendants are not entitled to judgment notwithstanding the verdict and the appellate court can order a new trial. *See Derr v. Safeway Stores,* 404 F.2d 634 (10th Cir. 1968); 9 Wright & Miller, Federal Practice & Procedure §2540 at 614 (1971); Fed. R. Civ. P. 50(c)(2), Notes of Advisory Committee at 200. We note, too that the Federal Rules permit a trial judge to order a new trial *sua sponte* within ten days of granting a judgment n.o.v., if he believes it is necessary to ensure substantial justice to the verdict-winner. Fed. R. Civ. P. 59(d). An appellate court should likewise be able to exercise such discretion, especially where as here there existed an alternative motion for a new trial, on which the lower court did not rule, despite the direction in Fed. R. Civ. P. 50(c)(1) to do so.

We conclude then that the issue of punitive damages in this case can only be properly resolved by a new trial, thereby affording plaintiff a more meaningful opportunity to prepare his case against Klein and the other individual defendants through interrogatories or depositions. The court of appeals has broad discretion to grant a new trial as to all or some issues. *Heckman v. Federal Press Co.,* 587 F.2d 612, 619 (3d Cir. 1978). In that case, we emphasized the general rule stated by the Supreme Court:

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retired is so distinct and separable from the others that a trial of it alone may be had without injustice.

Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931). We are not convinced that complete separation of the damage and liability considerations in this case is possible; therefore we conclude that the better course would be to have all plaintiff's claims for legal relief submitted to the jury on retrial.

VII.

Advancing an alternative motion for a new trial under Fed. R. Civ. P. 59, the defendants urged in the trial court that the liability verdict should be set aside because the verdicts were against the weight of the evidence. The trial court rejected both contentions. In light of our foregoing conclusion that a new trial is necessary on all legal claims, we need not review those decisions.

On damages, however, acting on defendants' new trial motion, the court took an action which was beyond its powers; lest the error recur on remand, we take this opportunity to address it. Concluding that the compensatory damage award of $15,000 exceeded the amount that a jury could properly award, the trial court reduced the award to one dollar. The court did so without affording the plaintiff the option of accepting a remittitur or a new trial. In a case where the facts as to damage are in dispute, the court may not do this without violating the Seventh Amendment. *Kennon v. Gilmer*, 131 U.S. 22 (1889); 6A Moore's Federal Practice ¶59.05[3] at 59-61 (2d ed. 1979). This is not a case, such as *Garfield Aniline Works v. Zendle*, 43 F.2d 537, 538 (3d Cir. 1930), in which the amount of damage is a matter of undisputed calculation. Thus the court's decision to set aside the verdict and enter judgment for one dollar cannot stand.

Moreover, we have serious questions about the court's view of the evidence of damage. The court's charge properly instructed the jury that Scott could in a Section 1983 action recover for "any pain, suffering and mental anguish already suffered by him and proximately resulting from the injury in question." If the jury concluded, as apparently it did, that Scott had been confined unnecessarily in the harsh conditions of the Vroom Building, it certainly could infer that he suffered pain and mental anguish. *See, e.g., Buse v. Hudkins,* 584 F.2d 223 (7th Cir. 1978), *cert. denied,* 440 U.S. 916 (1979) (prisoner entitled to more than nominal damages in view of less desirable living conditions at prison than at farm); *Mack v. Johnson,* 430 F. Supp. 1139 (E.D. Pa. 1977), *aff'd* 582 F.2d 1275 (3d Cir. 1978) (prisoner confined in segregation cell for 30 days compensative for deprivation of exercise and presumed mental anguish); *Wright v. McMann,* 321 F. Supp. 127 (N.D. N.Y. 1970) *aff'd in relevant part,* 460 F.2d 126 (2d Cir. 1972) ($1500 award to compensate prisoner for being confined nude in isolation). Where the fact of injury appears but damages are not susceptible of mathematical calculation, the court should not ordinarily disturb the jury's evaluation of an appropriate compensatory award. *Chuy v. Phila. Eagles Football Club,* 595 F.2d 1265, 1279 n.19 (3d Cir. 1979).

We do note, however, that the court was requested by defendants to charge that Scott not be compensated for damages due to lack of treatment for periods during which he refused a particular form of treatment. See *Donaldson v. O'Connor,* 422 U.S. 563, 569 n.4 (1975). Although this failure to charge might not, alone, have warranted a new trial, the court will have an opportunity to consider this request more carefully on remand. Moreover,

the court was requested to charge that damages could be awarded only for the period within the statute of limitations. The failure to give such a charge permitted the jury to assess damages from the time the plaintiff was first confined in 1954. We find no express ruling on this request and since it was not briefed, we do not pass on its merits. *See generally Rosenau v. City of New Brunswick*, 51 N.J. 130, 238 A.2d 169 (1968); *Stanley Development Co. v. Millburn Tp.*, 26 N.J. Super. 328, 97 A.2d 743 (1954); *cf. Stuebig v. Hammel*, 446 F. Supp. 31 (M.D. Pa. 1977) (Pennsylvania law).

VIII.

One remaining issue, not raised in Scott's brief, must, because of our disposition of this appeal, be adverted to. At the end of the plaintiff's case the court dismissed the State of New Jersey as a defendant. At that time the court did not have the benefit of the Supreme Court's opinions in *Maine v. Thiboutot*, 48 U.S.L.W. 4859 (U.S. June 25, 1980) and *Maher v. Gagne*, 48 U.S.L.W. 4891 (U.S. June 25, 1980). In remanding the case, however, we note the likelihood, if not the certainty, that Scott will apply for an award of attorney's fees pursuant to 42 U.S.C. §1988, thus directly implicating *Maher*. To avoid prolonging this protracted litigation any more than necessary, we believe it appropriate to point out, in light of the recent Supreme Court rulings and the facts of this case, that the State's presence as a defendant for purposes of awarding such counsel fees may be important. The judgment is not yet final. On remand, therefore, the court below may upon proper motion by the plaintiff reconsider its judgment dismissing the State as a party and determine whether it is an appropriate defendant against which an award of attor-

ney's fees might be made insofar as prospective injunctive relief is to be granted against the individual defendants in their official capacity.

IX.

The judgment in defendants' favor on Scott's claims for prospective relief will be vacated and the case remanded for consideration of specific equitable relief in light of Scott's right to be given adequate treatment and have his assignment to other less restrictive settings within Trenton Psychiatric Hospital carefully considered. With respect to the liability of the individual defendants for compensatory and punitive damages, the judgments below are vacated and the case remanded with direction to grant a new trial on these issues in light of this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit